CONCLUSION

For the foregoing reasons, the judgment below that the president has legal authority to detain Petitioner as an "enemy combatant" based on the facts alleged should be reversed and the case remanded with instructions that the habeas corpus petition be granted and the government be directed to release Petitioner from military custody forthwith.

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Dated: January 21, 2009

REPLY BRIEF

No. 08-368

In the Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI, PETITIONER

v.

DANIEL SPAGONE, UNITED STATES NAVY COMMANDER, CONSOLIDATED NAVAL BRIG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF IN SUPPORT OF THE MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO VACATE THE JUDGMENT BELOW AND REMAND WITH DIRECTIONS TO DISMISS THE CASE AS MOOT

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REPLY BRIEF IN SUPPORT OF THE MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO VACATE THE JUDGMENT BELOW AND REMAND WITH DIRECTIONS TO DISMISS THE CASE AS MOOT

Petitioner asks this Court to resolve extremely sensitive constitutional questions in order to render a hypothetical pronouncement that will not affect the legal rights of petitioner or any other person. This Court should decline that suggestion.

Petitioner does not contest that he has received all of the relief that he seeks in his habeas petition, or that upon his transfer, no individuals will remain detained as enemy combatants on United States soil.[1] In these cir-

[1] There have been a total of three individuals detained as enemy combatants on United States' soil during the entirety of the seven-plus

cumstances, petitioner's claim is entirely abstract. The hypothetical possibility of future detention on which petitioner relies is insufficient to prevent this case from being moot. The concerns underlying the mootness doctrine are at their height here, given that highly sensitive and fact-specific constitutional and national security matters are at stake. And, in any event, petitioner does not deny the strong *prudential* arguments counseling against review. See *Padilla* v. *Hanft*, 547 U.S. 1062, 1063 (2006) (Kennedy, J., concurring in denial of certiorari). Given that petitioner will be able to challenge any future detention should the need arise, there is no need for this Court to decide the seminal constitutional questions raised here without a concrete case before it.

1. Four salient considerations, none of which petitioner answers, militate strongly against further review in this case. First, against the backdrop of a comprehensive review of all detention policies, the President has effected a definitive and fundamental change in the government's treatment of petitioner. The President's February 27, 2009, Memorandum ends the custody that petitioner is challenging and directs that, upon petitioner's transfer to the control of the Attorney General, the authority to hold petitioner in military detention "shall cease." Mot. to Dismiss App. 1a. The Memorandum also unambiguously "supersedes" the June 23, 2003, Memorandum that ordered petitioner detained as an enemy combatant.[2] *Ibid.*

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year period since the September 11, 2001 attacks: petitioner, Jose Padilla, and Yaser Hamdi.

[2] Petitioner takes no position on the government's application to this Court to acknowledge petitioner's transfer to civilian custody. Accordingly, respondent respectfully asks this Court to grant that application.

Second, petitioner will now be subject to a different regime entirely: civilian criminal proceedings. He will have the opportunity to answer the charges against him, and he will be afforded the constitutional protections to which all criminal defendants are entitled.

Third, as a result of petitioner's transfer to civilian custody, he has now received all of the relief that he seeks in his habeas petition. C.A. App. 25 (seeking order "directing Respondent to charge Petitioner with a criminal offense or to release him"). No live controversy remains in this case.

Fourth, in light of the hypothetical nature of this dispute, the Court should refrain from deciding the sensitive constitutional issues presented by petitioner's challenge. It is well-settled that constitutional questions should not "be dealt with abstractly," but should be addressed "only as they are appropriately raised upon a record before" the Court. *Local No. 8-6, Oil Workers Int'l Union* v. *Missouri*, 361 U.S. 363, 370 (1960) (*Local No. 8-6*) (quoting *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Bd.*, 315 U.S. 740, 746 (1942)).

2. a. In light of these considerations, petitioner's reliance on the "voluntary cessation" doctrine is unavailing.[3] As petitioner acknowledges, the purpose of habeas corpus is to obtain release from confinement. Pet. Br. Opp. Mot. to Dismiss 7-8 (Resp.); see *Boumediene* v. *Bush*, 128 S. Ct. 2229, 2266-2267 (2008). Because the President has issued an order that releases petitioner from the custody he challenges as soon as the transfer can be effectuated, and because petitioner does not

[3] Petitioner does not contend that the "capable of repetition but evading review" exception prevents this case from being moot. Cf. Pet. Br. Opp. Mot. to Dismiss 7 n.5

claim that there are any ongoing collateral consequences of his detention, there is no additional relief that a court may order. See *Spencer* v. *Kemna*, 523 U.S. 1, 7-8 (1998); *Picrin-Peron* v. *Rison*, 930 F.2d 773, 775 (9th Cir. 1991) (court had no power to grant relief pursuant to habeas petition after prisoner was released); cf. *Padilla*, 547 U.S. at 1063 (Kennedy, J., concurring in denial of certiorari) ("Even if the Court were to rule in Padilla's favor, his present custody status would be unaffected.").

Indeed, the relief that petitioner now seeks has transmuted itself into something akin more to a declaratory judgment: a ruling that will "give [him] the assurance that he no longer faces the risk of renewed military detention." Resp. 7. But again, the purpose of habeas corpus is to challenge actual present custody, not to provide a vehicle for obtaining a declaration as to the legality of hypothetical future custody. And, indeed, petitioner has never sought such declaratory or injunctive relief. C.A. App. 25. Unlike an ordinary civil case, in which an injunction might be sought to prevent a defendant from resuming a challenged practice in the future, no hypothetical possibility of future detention can prevent petitioner's habeas petition from being moot. Unsurprisingly, petitioner cites no cases from this Court—and the government is aware of none—finding that a habeas case is not moot by application of the voluntary-cessation doctrine when the petitioner already has been released from custody.

b. In any event, petitioner's reliance on the voluntary-cessation doctrine reduces to the unsupported assertion that the government is simply attempting to "avoid review" (Resp. 8) while "preserv[ing] the claimed legal authority to detain [petitioner] as an enemy com-

batant" (Resp. 6) (internal quotation marks omitted). Those allegations cannot overcome the formal determination by the President that petitioner is to be *released* from custody as an enemy combatant in order to face civilian criminal charges against him.[4] See *Commercial Cable Co.* v. *Burleson*, 250 U.S. 360, 362 (1919) (finding challenge to presidential seizure "wholly moot" after President returned seized cable lines, despite asserted "fear that [the cable lines] may again be wrongfully taken"); *Padilla*, 547 U.S. at 1063 (Kennedy, J., concurring in denial of certiorari) (habeas petition rendered "hypothetical" by release from military detention).

Petitioner's assertions (Resp. 5, 6, 8) that the President's revocation of his enemy combatant detention is a temporary diversion intended to frustrate judicial review have no foundation. The government's institution of criminal charges against petitioner is the result of a grand jury finding of probable cause to believe that petitioner committed the crimes for which he has been indicted—a finding that independently supports the validity of the release and transfer. Moreover, these criminal charges are the product of a review directed by the President specifically with respect to petitioner and tremendous efforts by prosecutors and investigators. And that review of petitioner's status has occurred in the context of a comprehensive review of detention policies being undertaken by the Executive Branch. The government's decision to indict, and the President's decision to relinquish military detention so that petitioner shall face those charges, are actions entitled to a "presumption of

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[4] Petitioner correctly notes that the burden of establishing mootness is on the government; but that undisputed proposition (Mot. to Dismiss 9) does not aid petitioner because the government has satisfied that burden.

regularity." *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14 (1926)). Indeed, the presumption of regularity should be at its zenith when a formal determination by the President is at stake.

Other circumstances amply support the conclusion that transfer to criminal custody is a meaningful termination of the custody petitioner challenged. Jose Padilla, one of the two other enemy combatants formerly detained on United States soil, was subject to a similar presidential release and transfer—and was tried and incarcerated in the civilian system without ever facing re-designation.[5] And the government's agreement here (Mot. to Dismiss 9 n.4) that vacatur of the decision below would be appropriate conclusively demonstrates that the government is not attempting to preserve its victory while evading review. See *City News & Novelty, Inc.* v. *City of Waukesha*, 531 U.S. 278, 284 n.1 (2001). Thus, contrary to petitioner's contention (Resp. 4), there is "actual evidence" from experience—in addition to the formal determination by the President of the United States—establishing the legitimacy of the government's action.[6] See *Preiser* v. *Newkirk*, 422 U.S. 395, 402

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[5] Petitioner's assertion (Resp. 7 n.4) that the possibility of future detention will chill his criminal defense is unpersuasive. The criminal proceeding will take place under the supervision of the district court, with the full panoply of constitutional protections available to him, and petitioner will be able to immediately raise any claims relating to alleged violations of his rights.

[6] In contrast, the decisions on which petitioner relies all involved evidence that the defendant would likely resume the challenged conduct. See *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2751 (2007) (defendant ceased practice "pending the outcome of this litigation" while "vigorously defend[ing]" its legitimacy); *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167,

(1975); *County of Los Angeles* v. *Davis*, 440 U.S. 625, 632 (1979).

Moreover, there is no reasonable expectation that any hypothetical future military detention would arise in the same legal and factual context. Although petitioner suggests (Resp. 4) that the government "speculates" about the circumstances in which it might detain him in military custody in the future, the point is simply that even if petitioner were re-designated, the circumstances would almost certainly be different. In the short term, both the President's review of detention policies and petitioner's criminal proceedings will run their course and will transform the factual setting, both for the government and petitioner. And because the President's Memorandum removes the existing designation of petitioner as an enemy combatant subject to military detention, any future detention—were that hypothetical possibility ever to occur—would require new consideration under then-existing circumstances and procedure. See *Padilla*, 547 U.S. at 1063 (Kennedy, J., concurring in denial of certiorari) ("consideration of what rights [Padilla] might be able to assert" in the future would be speculative).

3. Petitioner invites the Court (Resp. 9) to issue what amounts to an advisory opinion "dispell[ing] once and for all" "the prospect of further military detention." Tellingly, however, petitioner has no answer to the powerful equitable and prudential concerns that counsel strongly against review here. Petitioner agrees (Resp.

176-178, 193 (2000) (finding issue of fact as to resumption of conduct where defendant had history of manipulative litigation practices); *Adarand Constructors, Inc.* v. *Slater*, 528 U.S. 216, 222-223 (2000) (defendant granted plaintiff the relief it sought, but in a patently invalid manner that was unlikely to be upheld).

10) that this case implicates "elemental constitutional concerns," but he points to no occasion on which this Court reached out to decide a case that would not affect the petitioner *or any other individual.*[7] Indeed, the Court has repeatedly declined to do just that. See, *e.g.*, *Local No. 8-6*, 361 U.S. at 396; *Kremens* v. *Bartley*, 431 U.S. 119, 133 (1977).

Nor can petitioner explain why his challenge must proceed now, despite its hypothetical nature, when any future detention could be "addressed if the necessity arises," in a manner that ensures that "the office and purposes of the writ of habeas corpus are not compromised." *Padilla*, 547 U.S. at 1063-1064 (Kennedy, J., concurring in denial of certiorari) (describing trial-court protections and original writ of habeas corpus). Neither petitioner's preference for prospective judicial habeas review (Resp. 8 n.6), nor the length of the past military detention from which he is now to be released (Resp. 8), can displace the equitable limitations of the writ or the caution that is called for in this sensitive area where national security policy and the Constitution intersect. In similar situations, this Court has acted on its prudential concerns by dismissing the writ. See *Medellin* v. *Dretke*, 544 U.S. 660, 666-667 (2005) (in light of possible relief in state courts, "it would be unwise to reach and resolve" difficult questions).

Finally, this Court has often recognized that a court may "forgo the exercise of its habeas corpus power," *Munaf* v. *Geren*, 128 S. Ct. 2207, 2220 (2008) (quoting

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[7] Contrary to petitioner's suggestion (Resp. 8-9), *Friends of the Earth*, 528 U.S. at 191-192, and *Pacific Bell Tel. Co.* v. *Linkline Commc'ns, Inc.*, No. 07-512 (Feb. 25, 2009), slip op. 7, did not indicate that judicial resource concerns would ever cause the Court to decide constitutional questions unnecessarily.

Francis v. *Henderson*, 425 U.S. 536, 539 (1976)) when confronted with a case that is not one "in which [that power] ought to be exercised," *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830) (Marshall, C.J.); see 28 U.S.C. 2241(a) (providing that writ "*may* be granted" (emphasis added)). The Court has therefore refrained from exercising its habeas jurisdiction where prudential concerns—such as interference with foreign affairs or national security—counsel against entertaining the writ. See *Munaf*, 128 S. Ct. at 2221. Here, even if petitioner's case were not moot for Article III purposes, compelling prudential concerns militate against exercising habeas jurisdiction to decide complex constitutional questions in a hypothetical posture. This Court should therefore dismiss the writ of certiorari in its equitable discretion (or vacate the judgment and remand with directions to dismiss, see 28 U.S.C. 2106) even if it does not conclude that the case is moot.

* * * * *

The writ of certiorari should be dismissed. In the alternative, the judgment below should be vacated and the case remanded with directions to dismiss the habeas corpus action as moot, or in the exercise of equitable discretion.

Respectfully submitted.

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Acting Solicitor General

MARCH 2009

AMICUS CURIAE BRIEF

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No. 08-368

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IN THE

Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,
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v.

COMMANDER DANIEL SPAGONE, U.S.N.,
CONSOLIDATED NAVAL BRIG.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association (the "ABA") respectfully submits this brief as *amicus curiae*. The ABA is the largest

[1] No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief and such consents are on file with the Clerk of this Court.

voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of more than 400,000 spans all 50 states and other jurisdictions, and includes attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and law students.[2]

The ABA offers a unique perspective on the issue now before the Court, which is whether an individual lawfully within the United States may be detained by the United States military and held indefinitely without charge or trial. As the national voice of the legal profession, the ABA has a special interest in and responsibility for protecting the rights guaranteed by the Constitution, safeguarding the integrity of our legal system, and fostering the growth of the rule of law, both at home and abroad. Indeed, the ABA's Constitution states, in pertinent part, "The purposes of the Association are to uphold and defend the Constitution of the United States and maintain representative government."[3] Further, over its one hundred year-plus history, the ABA has developed special competence in the area of protection of the rights of persons deprived of their liberty by arrest or detention.

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to its filing.

[3] ABA Constitution available at www.abanet.org/polcy /constitution_and _bylaws.pdf.

Based on studies conducted by its task forces and resolutions adopted by its policy-making body, the ABA believes that the constitutionally guaranteed criminal due process rights that are available to all citizens and persons lawfully present in the United States may not be abrogated during military detention unless through constitutionally permissible means, which must include the opportunity for prompt and meaningful judicial review, effective assistance of counsel, and only if any detention thereafter is pursuant to an Act of Congress that establishes constitutionally permissible standards and procedures.

SUMMARY OF ARGUMENT

The September 11, 2001 terrorist attack on the United States has resulted in a profound struggle to balance the protection of the people with each person's individual rights. After careful study, and based on the experiences and judgment of a broad range of legal practitioners, the ABA has formulated policies that it believes strike the appropriate balance for these times. The ABA also has urged Congress and the Executive Branch to consider how any proposed legislation and policy regarding detention of "enemy combatants" may affect the response of other nations to future acts of terrorism and to the efforts of the United States in promoting the rule of law.

At the heart of the ABA policies is the conclusion that—while the present threats warrant greater security—the due process principles upon which this nation was founded must be preserved. It is the ABA's position that the constitutionally guaranteed criminal due process rights that are available to all citizens and persons lawfully present in the United States may not be abrogated during military deten-

tion unless such persons are given the opportunity for prompt meaningful judicial review. This review must include meaningful access to, and effective assistance of, counsel. Also, any resulting detention can be permissible only if pursuant to an Act of Congress that establishes constitutionally permissible standards and procedures. The ABA believes that this commitment to due process is essential to the preservation of our core principles of liberty at home and to our leadership role in promoting the rule of law globally, even in exigent circumstances.

ARGUMENT

OUR CONSTITUTIONALLY GUARANTEED CRIMINAL DUE PROCESS RIGHTS, EVEN IN GRAVE TIMES, MAY NOT BE ABROGATED EXCEPT THROUGH CONSTITUTIONALLY PERMISSIBLE MEANS.

For over two hundred years, whenever this nation has been confronted by war, our government has struggled to achieve a proper balance between the protection of the people and each person's individual rights. After the September 11, 2001 attack, Congress and the President were forced to take unprecedented steps to ensure the safety of this nation and of innocents worldwide. While recognizing the government's responsibility to work to prevent another attack on our nation, ABA asserts that this country must also be vigilant in defining those lines that cannot be crossed. As our national experience has taught us:

> [W]e must be on constant guard against excessive use of any power, military or otherwise, that results in the needless destruction of our rights and liberties.

> * * * And we must ever keep in mind that "the Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.

Duncan v. Kahanamoku, 327 U.S 304, 335 (1946) (Murphy, J. concurring) (quoting *Ex parte Milligan,* 71 U.S. 2, 120-21 (1866)).

The ABA believes that the methods employed in the cause of national security, even in grave times, must comply with constitutionally permissible statutory law and policy, and with international law to which the United States is a signatory. As this Court stated, "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . those liberties . . . which make[] the defense of the Nation worthwhile." *United States v. Robel,* 389 U.S. 258, 264 (1967).

Accordingly, the ABA, through its members and appointed Task Forces, has studied the Acts of Congress and the implementing orders of the Executive that have resulted from the September 11, 2001 attack. Based on the experiences and judgment of a broad range of legal practitioners, the ABA has adopted policies[4] that it believes strike the appropri-

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[4] The ABA's policymaking body is its House of Delegates, which is comprised of more than 500 delegates. Reports that recommend the adoption of specific policy positions may be submitted by ABA delegates representing states and territories, state and local bar associations, affiliated organizations, ABA sections and divisions, ABA members and the Attorney General of the United States, among others. The full House votes on the recommendations and those that are approved become ABA

ate balance between national security needs and the preservation of our fundamental freedoms, as well as the preservation of the constitutionally established balance of powers among our branches of government.

At the heart of the ABA's policies is the conclusion that the constitutionally guaranteed criminal due process rights that are available to all citizens and persons lawfully present in the United States may not be abrogated during military detention unless such persons are given the opportunity for prompt meaningful judicial review, with meaningful access to, and effective assistance of, counsel, and only if any detention thereafter is pursuant to an Act of Congress that establishes constitutionally permissible standards and procedures.

In February 2002, five months after the September 11, 2001 terrorist attack, the ABA voiced concern about the military order titled, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." This order was issued by President Bush, assertedly pursuant to his authority as President and Commander in Chief under the Constitution and laws of the United States, including the Authorization for Use of Military Force Joint Resolution, 115 Stat. 224 ("AUMF").

After careful study, the ABA adopted a policy specifically urging that the President and Congress assure that neither this military order, nor any similar military order that might be issued, would be deemed applicable to United States citizens, lawful resident aliens, and other persons lawfully present in the

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policy. *See* ABA Leadership, House of Delegates - General Information, *available at* http://www.abanet.org/leadership/delegates.html.

United States.[5] The ABA did so because the military order authorized military commissions that, in the

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[5] *Revised Recommendation 8C* (adopted Feb. 2002). *Available at* http://www.abanet.org/poladv/letters/107th/militarytrib8c.pdf. The policy urged that "the President and Congress should assure that the law and regulations governing any tribunal will:

1. Not be applicable to United States citizens, lawful resident aliens, and other persons lawfully present in the United States;
2. Not be applicable to persons apprehended or to be tried in the United States, except for persons subject to the settled and traditional law of war who engage in conduct alleged to be in violation of such law of war;

* * *

4. Not permit indefinite pretrial detention of persons subject to the order;
5. Require that its procedures for trials and appeals be governed by the Uniform Code of Military Justice except Article 32 and provide the rights afforded in courts-martial thereunder, including but not limited to provision for certiorari review by the Supreme Court of the United States (in addition to the right to petition for a writ of habeas corpus), the presumption of innocence, proof beyond a reasonable doubt, and unanimous verdicts in capital cases; and
6. Require compliance with Articles 14 and 15(1) of the International Covenant on Civil and Political Rights, including, but not limited to, provisions regarding prompt notice of charges, representation by counsel of choice, adequate time and facilities to prepare the defense, confrontation and examination of witnesses, assistance of an interpreter, the privilege against self-incrimination, the prohibition of ex post facto application of law, and an independent and impartial tribunal, with the proceedings open to the public and press or, when proceedings may be validly closed to the public and press, trial observers, if available, who have appropriate security clearances.

ABA's opinion, would not satisfy constitutional minimum guarantees and would entail substantially fewer protections than those required for trials conducted in federal district court or under the Uniform Code of Military Justice.[6]

Concerned that constitutional safeguards were not being properly considered in connection with other military orders and actions taken by the Executive, the ABA formed a Task Force on Treatment of Enemy Combatants in March 2002. This Task Force was charged with examining the constitutional, statutory, and international law and policy questions raised by the detention of "enemy combatants." In February 2003, the Task Force submitted its resolutions and report to the ABA House of Delegates, after having circulated them in preliminary form to ABA members, working groups from the ABA's Criminal Justice Section and the Section of Individual Rights and Responsibilities, and the Congress and the Executive. The resolutions, which were adopted as ABA policy in February 2003, focused on the safeguards that should

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The policy also urged the "Executive and Legislative branches, in establishing and implementing procedures and selecting venues for trial by military tribunals, to give full consideration to the impact of its choices as precedents in (a) the prosecution of the U.S. citizens in other nations and (b) the use of international legal norms in shaping other nations' responses to future acts of terrorism." *Id.*

[6] *See,* Report in support of Resolution 8C. Available from the ABA. Although only the resolutions submitted to the House of Delegates may be adopted as policy of the ABA, their accompanying reports are considered by the House in determining whether to approve the resolutions as ABA policies. These reports must be approved by the sponsoring entity and must contain the reasons for the proposed resolutions. ABA Constitution and Bylaws, Article 45.2(3) and (6) (2008-2009).

be employed when the government designates and detains, as "enemy combatants," United States citizens or other persons lawfully present in the United States.[7]

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[7] Task Force on Treatment of Enemy Combatants, *Revised Recommendation* 109 (adopted Feb. 10, 2003). *Available at* http://www.abanet.org/leadership/recommendations03/109.pdf The policy, which was co-sponsored by the ABA's Criminal Justice Section, the Section of Individual Rights and Responsibilities, the Senior Lawyers Division, the Section of Litigation, the General Practice, Solo and Small Firm Section, and the Section of Administrative Law and Regulatory Practice, reads:

> **RESOLVED**, That the American Bar Association urges that U.S. citizens and residents who are detained within the United States based on their designation as "enemy combatants" be afforded the opportunity for meaningful judicial review of their status, under a standard according such deference to the designation as the reviewing court determines to be appropriate to accommodate the needs of the detainee and the requirements of national security; and
>
> **FURTHER RESOLVED**, That the American Bar Association urges U.S. citizens and residents who are detained within the United States based on their designation as "enemy combatants" not be denied access to counsel in connection with the opportunity for such review, subject to appropriate conditions as may be set by the court to accommodate the needs of the detainees and the requirements of national security; and
>
> **FURTHER RESOLVED**, That the American Bar Association urges Congress, in coordination with the Executive Branch, to establish clear standards and procedures governing the designation and treatment of the U.S. citizens, residents, or others who are detained within the United States as "enemy combatants;" and
>
> **FURTHER RESOLVED**, That the American Bar Association urges that, in setting and executing national policy regarding detention of "enemy combatants," Congress and the Executive Branch should consider how the policy

In its accompanying report,[8] the Task Force noted that the cases of Yaser Hamdi and Jose Padilla, both United States citizens, were then proceeding through the courts. The Task Force concluded that these cases raised troublesome and profound issues, especially in light of the observation by the United States Court of Appeals for the Fourth Circuit that the government had taken the position that "with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Hamdi v. Rumsfeld,* 296 F.3d 278, 283 (4th Cir. 2002). The Task Force noted that the Executive had maintained that its power to detain "enemy combatants" indefinitely without bringing criminal charges derived from Supreme Court precedent, in particular, *Ex parte Quirin,* 317 U.S. 1 (1942), and from the laws of war.

The Task Force noted, however, that the *Quirin* defendants were able to seek review and were represented by counsel. Further, the question for decision had been whether their detention for trial by Military Commission was "in conformity with the laws and Constitution of the United States." *Quirin,* 317 U.S. at 18. Since the *Quirin* Court had held that these enemy aliens—who were not lawfully within the United States—were entitled to judicial review, the Task Force concluded that the same entitlement could not be denied to United States citizens and other persons lawfully present in the United States, especially when held without charges.

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adopted by the United States may affect the response of other nations to further acts of terrorism.

[8] Resolution and Report 109 (adopted Feb. 2003). Available from the ABA.

Specifically as to the AUMF, the Task Force concluded that neither the AUMF nor any laws enacted in response to terrorist attacks expressly authorized detention of United States citizens as "enemy combatants." Further, 18 U.S.C. § 4001(a) raised serious questions about using the AUMF in support of such detentions.[9] The Congressional House Report accompanying the legislation that became Section 4001(a) stated that the purpose of the bill was "to restrict the imprisonment or other detention of citizens by the United States to situations in which statutory authority for their incarceration exists" and to repeal the Emergency Detention Act of 1950 ("EDA"). *See* H.R. Rep. No. 92-116, at 1435 (1971). The EDA had been enacted at the beginning of the Korean War and had authorized the establishment of domestic detention camps to hold, during internal security emergencies, individuals deemed likely to engage in espionage or sabotage. *Id.* at 1435-36. The House Report noted that "the constitutional validity of the Detention Act was subject to grave challenge because it allowed for detention merely if there was reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage." *Id.* at 1438.

The Task Force concluded that, if the AUMF is nevertheless interpreted as authorizing detentions of "enemy combatants" including United States citizens and others lawfully present in the United States, standards for detention must be established and judicial review must be required to determine, with ap-

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[9] 18 U.S.C. § 4001(a) states: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."

propriate deference to the President's determination, whether the detention meets those standards.

However, the Task Force noted, appropriate deference does not mean that the courts may not review Executive determinations as to the scope of its authorization. *See Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 587 (1952) (executive order taking possession of private property was not sustained as exercise of President's military power as Commander in Chief, even though "theater of war" was an expanding concept). Courts have preserved their role in reviewing Executive detentions even in times of war. *See, e.g., Robel,* 407 U.S. at 318-19 ("The standard of judicial inquiry must also recognize that the 'concept' of 'national defense' cannot be deemed an end in itself, justifying an exercise of [executive] power designed to promote such a goal"). *See also, In re Yamashita,* 327 U.S. 1, 8 (1946) ("The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner").

Based on this analysis, the Task Force concluded that "enemy combatants" who were citizens or lawfully within the United States, and who had not been charged with a crime or a violation of the law of war, must be afforded a prompt opportunity for meaningful judicial review of the legal basis for their detention. This review, further, must include the right to effective assistance of counsel, since the right to judicial review could well be meaningless if detainees were not afforded effective assistance of counsel in challenging their detention.

The Task Force also noted that legislation was required that would establish constitutionally acceptable standards and procedures under which a court

could determine whether continued detention was permissible. This was necessary because, in the Task Force's opinion, the AUMF and, accordingly, Section 4001(a), were applicable to detentions of United States citizens and others lawfully present in the United States as "enemy combatants." *Compare, Hamdi,* 542 U.S. 507, 519 (2004) (Congress "clearly and unmistakably" authorized detention under the AUMF "in the narrow circumstances considered here" of an armed Taliban soldier captured in combat).

Certainly Congressional silence has never been sufficient to authorize military jurisdiction over civilians seized while legally within the United States. *See, e.g., Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946) (in authorizing "martial law" under Hawaiian Organic Act, Congress did not authorize supplanting of courts by military tribunals); *Milligan*, 71 U.S. at 136-37 (Chase, C.J., concurring) (where provisions of act contemplated no trial or sentence other than by civil court, trial by military commission could not be asserted). If the Executive is to be authorized to assert military jurisdiction over citizens or persons lawfully present in the United States and to dispense with their constitutionally guaranteed criminal due process rights, then Congress must say so and fixed procedures governing such jurisdiction must be in place. As stated in the ABA policy:

> "FURTHER RESOLVED, That the American Bar Association urges Congress, in coordination with the Executive Branch, to establish clear standards and procedures governing the designation and treatment of U.S. citizens, residents and others who are detained within the United States as "enemy combatants."

Finally, the Task Force concluded that, in setting and executing national policy regarding citizens and other persons lawfully present in the United States who are detained as "enemy combatants," both Congress and the Executive should consider how that policy may affect the response of other nations to future acts of terrorism. The Task Force noted that international agreements and principles recognized by the United States, which include the Universal Declaration of Human Rights[10] and the International Covenant on Civil and Political Rights,[11] support the protection of individuals from arbitrary detention and guarantee a meaningful review of a detainee's status. These and other international human rights treaties, conventions and jurisprudence are the result, in sub-

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[10] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) available at http//www.un.org /Overview/rights.html. Article 8 declares that everyone has the right to an effective remedy by the competent national tribunal for acts violating the fundamental rights granted him by the constitution of by law. Article 9 provides that no one shall be subjected to arbitrary arrest, detention or exile. For the role of the United States in the drafting and adoption of the Universal Declaration, *see* Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001).

[11] International Covenant on Civil and Political Rights, available at http//unhchr.ch/html/menu3/b/a_ccpr.htm. Article 9 provides that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." Article 14 describes standards and procedures that should be used in all courts and tribunals. Article 15(1) provides, *inter alia*, that no person shall be held guilty of a criminal offense that does not constitute a criminal offense under national or international law. Articles 14 and 15(1) are referenced in ABA Policy 8C, which is quoted in n. 5, *infra*.

stantial part, of the leadership of the United States and its efforts to promote the rule of law.

The ABA also notes that, throughout the world, constitutions and rules of criminal procedure reflect the United States' influence and leadership in promoting the rule of law. The ABA has played a role in those efforts, especially through its Rule of Law Initiative. This Initiative assists countries, including the former Soviet republics and countries in Europe, Eurasia, Asia, Africa, the Middle East and Latin America, to develop and implement legal reforms and respect for the rule of law.[12] The training programs that the ABA conducts for attorneys and judges in these countries help to ensure the growing force of the rule of law.[13]

Reaffirmation of the rights of U.S. citizens and legal residents to access to the courts encourages the adoption of the rule of law, solidifies our relations with other nations, and works to protect our country and the world from terrorism. The denial of the protection of judicial process to those declared to be "enemy combatants" undermines these important goals. As Lord Peter Goldsmith, then Attorney General of the United Kingdom, stated in a speech to the ABA House of Delegates, the threat of terrorism "does not mean that we have an unlimited license to throw away our values for the sake of expediency"; rather the rule of law requires "subjecting executive action

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[12] *See* About the ABA Rule of Law Initiative, *available at* http://www.abanet.org/rol/about.shtml.

[13] *See* Judicial Reform Programs, *available at* http://www.abanet.org/rol/programs/judicial-reform.html and Legal Profession Reform Programs, *available at* http://www.abanet.org/rol/programs/legal-profession.html (describing the ABA's international training programs for judges and attorneys).

to the scrutiny of the democratic institutions and also of the courts, for judicial scrutiny is a key part of the rule of law."[14]

CONCLUSION

The American Bar Association, as amicus curiae, respectfully requests that this Court hold that the constitutionally guaranteed criminal due process rights that are available to all citizens and persons lawfully present in the United States may not be abrogated during military detention unless such persons are given the opportunity for prompt meaningful judicial review, with meaningful access to, and effective assistance of, counsel for such review, and only if any detention thereafter is pursuant to an Act of Congress that establishes constitutionally permissible standards and procedures.

Respectfully submitted,

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[14] American Bar Association: Lord Peter Goldsmith, Attorney General United Kingdom Addresses House of Delegates (speech delivered Feb. 12, 2007), *available at* http://www.abavideonews.rog/ABA404/av.php#rss.

AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,

Petitioner,

v.

COMMANDER DANIEL SPAGONE,
U.S.N., CONSOLIDATED NAVAL BRIG,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Association of the Bar of the City of New York ("ABCNY") is a professional association of over 22,000 attorneys. Founded in 1870, ABCNY has long been committed to studying, addressing, and promoting the rule of law and, when appropriate, law reform. Through its many standing committees, ABCNY educates the bar and public about legal issues relating to the war on terrorism, the pursuit of suspected terrorists, and the treatment of detainees.

ABCNY believes that the federal system of civilian courts is well-equipped to try individuals such as petitioner who are accused of terrorist activities after being arrested within the United States. ABCNY is deeply concerned about the novel and far-reaching theory of military detention upheld by a bare five-judge majority of the *en banc* Fourth Circuit, which represents a departure from our Nation's longstanding ideals and traditions. ABCNY submits this brief to present this Court with additional information about the capacity of the federal justice system to handle criminal cases against individuals suspected of complicity in terrorism.[1]

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[1] All parties have consented to this filing. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

More than five and a half years ago, petitioner was wrested from the criminal justice system and transferred into military custody in South Carolina, where he remains today. As was the case when Jose Padilla was taken into military custody, petitioner's confinement at the Naval Consolidated Brig in South Carolina raises fundamental legal questions and has spawned conflicting lower-court rulings. An obvious alternative to the military detention of petitioner would be to prosecute him in the criminal justice system—as was ultimately done with Padilla. Below, however, the members of the *en banc* Fourth Circuit disagreed regarding the capability of the civilian justice system to handle terrorism cases such as that of petitioner.

Expressing no qualms about the capacity of the criminal justice system, the Fourth Circuit plurality would have ordered that the writ be granted and that the government proceed with a criminal prosecution of petitioner if it wishes to detain him for a significant period of time. Pet. App. 9a (Motz, J., concurring in judgment). In his separate opinion, however, Judge Wilkinson asserted that "prosecutions of terrorist suspects have frequently proven to be difficult, both as a practical and logistical matter and as a broader gauge of what the judiciary's proper role should be on matters touching quite intimately on the conduct of war." *Id.*, at 220a. Although he acknowledged that the justice system "retains an important place in our constitutional system when handling the terrorist threat" (*id.*, at 207a), Judge Wil-

kinson recited a series of alleged flaws and deficiencies in the capacity of the federal courts to handle terrorism cases. *Id.*, at 211a-216a. Judge Wilkinson argued that Congress was conscious of these alleged inadequacies and that, as a result, it must have intended the AUMF to authorize the military detention of persons such as petitioner whose prosecution, according to Judge Wilkinson's analysis, would be difficult or impossible in federal court. *Id.*, at 216a.

The legislative history surrounding the adoption of the AUMF, however, contains no evidence that Congress considered the adequacy of the criminal justice system as a means of prosecuting alleged terrorists, such as petitioner, who are arrested within the United States. Nor is there any evidence in the legislative history that Congress considered authorizing military detention as an alternative to criminal charge and trial in such circumstances. As petitioner shows, such a departure from our Nation's traditions and precedents raises serious constitutional questions and would require at least a clear statement from Congress.

Further, and contrary to the views of Judge Wilkinson, ABCNY strongly believes that our existing legal system is capable of handling such prosecutions. Indeed, a large body of data from the past two decades demonstrates that terrorism prosecutions in the federal courts have overall led to just, reliable results without security breaches or other problems that threaten our Nation's safety. The need for, or wisdom of, a domestic preventive detention scheme as an alternative to the criminal justice system is a subject of intense public debate. Apart from implicating legal issues, that debate raises issues of policy that

Congress is best suited to resolve. It is implausible that Congress did so in silence and without discussion.

In this brief, we discuss the available data regarding terrorism prosecutions in federal court and describe:

- The broad range of substantive statutes that are available to prosecutors in terrorism cases, see *infra*, at I.B.1;
- The multiple sources of authority, under settled law, to detain suspected terrorists within the civilian justice system, see *infra*, at I.B.2;
- The demonstrated ability of judges and lawyers to preserve the confidentiality of classified information while ensuring fair trials, see *infra*, at I.B.3;
- The practical approaches to evidentiary issues that have been followed in terrorism cases, see *infra*, at I.B.4;
- The tools to protect the safety and security of the participants in the criminal justice system and the public at large, see *infra*, at I.B.5; and
- The ability of prosecutors to develop reliable intelligence information by debriefing cooperating defendants, see *infra*, at 1.B.6.

In our discussion, we point out the many ways in which petitioner's own criminal case—up until the time that he was suddenly removed from civilian custody—illustrates the effectiveness and capability of the justice system.

Of course, this does not mean that the criminal justice system, by itself, is "the answer" to the prob-

lem of international terrorism. ABCNY recognizes that the government must use all lawfully available tools to address the threat that terrorism poses to our Nation. Nevertheless, as the plurality concluded below, if the government wishes to detain petitioner for an extended period of time, he is entitled to the protections of the criminal justice system. Moreover, an extensive body of evidence demonstrates that the criminal justice system has effectively handled terrorism prosecutions.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE CONCLUSION THAT THE CRIMINAL JUSTICE SYSTEM IS CAPABLE OF EFFECTIVELY HANDLING TERRORISM CASES

In recent years, many observers have expressed views on the capability of the criminal justice system to handle terrorism cases. Some commentators have argued for novel authority to indefinitely detain terrorism suspects who may not be subject to traditional law-of-war detention but who, it is claimed, cannot prudently be afforded the protections enjoyed by criminal defendants. See, *e.g.*, Michael B. Mukasey, Op-Ed, *Jose Padilla Makes Bad Law*, Wall St. J., Aug. 22, 2007, at A15; Jack L. Goldsmith & Neal Katyal, Op-Ed, *The Terrorists' Court*, N.Y. Times, July 11, 2007, at A19; Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* (Penguin Press 2008). Others, including ABCNY, have expressed confidence in the ability of the criminal justice system to handle terrorism cases and have been skeptical about novel claims of authority to de-

tain or try accused terrorists. See Ass'n of the Bar of the City of N.Y., Comm. on Fed. Courts, *The Indefinite Detention of "Enemy Combatants": Balancing Due Process and National Security in the Context of the War on Terror* (Feb. 6, 2004);[2] Kelly Anne Moore, Op-Ed, *Take Al Qaeda to Court*, N.Y. Times, Aug. 21, 2007; David H. Laufman, *Terror Trials Work: Yes, Mr. Mukasey, Courts Can Handle National Security Cases*, Legal Times, Nov. 5, 2007, at 58-59.

In May 2008, two of the authors of this brief prepared *In Pursuit of Justice*, an assessment of the capability of the criminal justice system to handle terrorism cases. See Richard B. Zabel & James J. Benjamin, Jr., Human Rights First, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* (2008).[3] *In Pursuit of Justice* concluded that while the federal courts are certainly not perfect, and while terrorism cases can present significant challenges, "the criminal justice system is reasonably well-equipped to handle most international terrorism cases." *In Pursuit of Justice*, at 2. In the eight months since *In Pursuit of Justice* was released, new developments in terrorism cases have only reinforced the central thesis of the paper. The following discussion draws heavily on *In Pursuit of Justice* and also, at times, incorporates a discussion of petitioner's own aborted criminal case.

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[2] http://www.abcny.org/pdf/report/1C_WL06!.pdf

[3] www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf

A. The Methodology And Data Underlying Our Empirical Analysis Of Terrorism Cases

Assessing the capability of the criminal justice system in terrorism cases need not be—and in our view should not be—a theoretical or academic exercise, nor should it be skewed by assertions of speculative benefits or hypothetical problems with civilian court prosecutions. Instead, the discussion should be based on actual experience. Over the years, and especially since the early 1990s, the government has brought scores of actual prosecutions in federal court against defendants alleged to be complicit in terrorism. These cases provide a rich set of data that is useful in assessing the adequacy of the justice system.

By any standard, the roster of completed terrorism cases is impressive. It encompasses prosecutions brought before 9/11 against Ramzi Yousef, the mastermind of the first World Trade Center bombing; Sheikh Omar Abdel Rahman, the blind Egyptian cleric who plotted to destroy tunnels and other landmarks in New York City; Wadih el-Hage and other conspirators responsible for the horrific bombings of the U.S. embassies in Kenya and Tanzania in 1998; and Ahmed Ressam, the so-called "Millennium Bomber," who planned to detonate a bomb at Los Angeles International Airport. In the years since 9/11, the government has successfully prosecuted additional high-profile terrorism defendants in federal court, including Zacarias Moussaoui, who was at one time believed to be the "20th Hijacker"; Jose Padilla, the former Chicago gang member and al Qaeda adherent; Richard Reid, the "Shoe Bomber"; John

Walker Lindh, the "American Taliban"; and numerous defendants involved in providing financial or other support for Islamist terrorism.

In Pursuit of Justice examined these and many other terrorism cases and presented statistics about federal-court prosecutions relating to Islamist terrorism in the years since 9/11. The authors identified prosecutions that the Department of Justice or the popular media stated were related to terrorism, consulted lists of terrorism prosecutions compiled by various organizations, and searched electronic collections of federal docket information for indictments charging terrorism offenses. *In Pursuit of Justice,* at 22-23. They looked not only at cases brought under specific terrorism statutes but also at those based on "alternative charges" such as credit card fraud or immigration violations, so long as some aspect of the public record alleged a link to terrorism. *Id.*, at 22. Using these data-collection methods, the paper identified 107 terrorism cases brought between September 2001 and December 2007 charging a total of 257 defendants. *Id.*, at 23, 26.

The statistics on the 257 defendants reveal a system that is well-equipped to detain, convict, and sentence those who are guilty of crimes relating to terrorism. The conviction rate was high—some 91% of defendants were convicted of at least one offense. *Id.*, at 26. About 70% of defendants were held without bail. *Id.*, at 24, 29. Of the 124 defendants in the paper's data set who were convicted and sentenced, 111 were sentenced to some term of imprisonment. *Id.*, at 26. Excluding the five persons who were sentenced to life imprisonment, the average term of im-

prisonment for the other 106 defendants was 100.71 months, or 8.39 years. *Ibid.*

In the eight months since *In Pursuit of Justice* was published, the courts have continued to render judgments in terrorism cases. For example, the Second Circuit recently upheld the convictions of the Embassy Bombers in three unanimous opinions spanning 125 pages. See *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 549 F.3d 146 (CA2 2008); *In re Terrorist Bombings of U.S. Embassies in E. Africa (Fifth Amendment Challenges)*, 548 F.3d 237 (CA2 2008); *In re Terrorist Bombings of U.S. Embassies in E. Africa (Fourth Amendment Challenges)*, 548 F.3d 276 (CA2 2008). In August 2008, a Fourth Circuit panel including Judges Wilkinson and Motz upheld the conviction of Ahmed Omar Abu Ali, a native of Virginia who trained with al Qaeda in Saudi Arabia and who was arrested and interrogated by Saudi authorities before being turned over to the U.S. government for prosecution. See *United States* v. *Abu Ali*, 528 F.3d 210 (CA4 2008). And after a prior trial ended in a hung jury, the government secured guilty verdicts in the *Holy Land Foundation* terrorism-finance case in the Northern District of Texas. See Jury Verdict, *United States* v. *Holy Land Found. for Relief & Dev.*, No. 04-cr-240-P (N.D. Tex. Nov. 24, 2008) (Dkt. No. 1250) ("*Holy Land* Jury Verdict").

B. The Criminal Justice System Has Consistently Exhibited Both The Vitality And The Adaptability To Effectively Handle Terrorism Cases

1. Existing criminal statutes proscribe a broad range of potential terrorist conduct

The robust capability of the criminal justice system to deal with terrorism cases begins with "the well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorists might commit." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 547 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in judgment). Of the criminal statutes enacted specifically to combat terrorism, the most oft-used since 9/11 have been the "material support" statutes codified at 18 U.S.C. §§ 2339A and 2339B. See *In Pursuit of Justice*, at 32 (noting that §§ 2239A or 2339B have been charged in almost half of the post-9/11 terrorism cases). Section 2339A, enacted in response to the 1993 World Trade Center bombing, makes it a crime to provide material support with the knowledge or intent that it will be used to further any of a number of specified terrorism-related offenses. 18 U.S.C. § 2339A(a). Meanwhile, § 2339B prohibits material support to any "foreign terrorist organization" if the defendant knows that the organization engages in terrorist activity or has been designated as a foreign terrorist organization. 18 U.S.C. § 2339B(a)(1).

Courts have interpreted "material support" expansively to include a broad range of conduct abetting terrorists. See, *e.g.*, *United States* v. *Shah*, 474 F. Supp. 2d 492 (S.D.N.Y. 2007) (providing medical services constitutes material support); *United States* v. *Sattar*, 395 F. Supp. 2d 79, 100 (S.D.N.Y. 2005) (conveying messages between terrorists constitutes material support). And prosecutors have taken advantage of the broad scope of these statutes to preempt terrorist attacks by arresting defendants at the early stages of their plotting. See, *e.g.*, Second Superseding Indictment, *United States* v. *Hayat*, No. 05-

cr-240 ("*Hayat* Proceedings") (E.D. Cal. Jan. 26, 2006) (Dkt. No. 162) & Verdict, *Hayat* Proceedings (Apr. 25, 2006) (Dkt. No. 331) (defendant traveled to Pakistan to receive "jihadist training" but was indicted before he could "wage violent jihad against the United States"); Superseding Information & Plea Agreements, *United States* v. *Ahmed*, No. 07-cr-647 ("*Ahmed* Proceedings") (N.D. Ohio Jan. 15, 2009) (Dkt. Nos. 129, 132, 133) (defendants arrested before they could travel overseas to kill U.S. soldiers as described in U.S. Dep't of Justice, Press Release, *Chicago Cousins Plead Guilty to Conspiracy to Provide Material Support to Terrorists* ("Ahmed Press Release"));[4] *United States* v. *Goba*, 220 F. Supp. 2d 182, 218 (W.D.N.Y. 2002) (defendants who trained in al Qaeda camp held on evidence suggesting that, *inter alia*, they were "plan[ning] attack upon Americans"). Section 2339B has also been used to cut off suspected channels of support to terrorist groups. See, *e.g.*, *United States* v. *Paracha*, No. 03-cr-1197, 2006 WL 12768, at *1-2 (S.D.N.Y. Jan. 3, 2006) (describing charges against defendant for laundering money and for obtaining immigration documents for known al Qaeda member); *Holy Land* Jury Verdict (convicting defendants under § 2332B for providing financial support to Hamas, a designated foreign terrorist organization).

Other federal criminal statutes designed to thwart terrorism are found in Chapter 113B of the Criminal Code, entitled "Terrorism." For example,

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[4] http://www.usdoj.gov/opa/pr/2009/January/09-nsd-041.html

prosecutors used 18 U.S.C. § 2332, which prohibits serious attacks on U.S. nationals abroad, to convict Richard Reid, a/k/a the "Shoe Bomber." See Judgment, *United States* v. *Reid*, No. 02-cr-10013 (D. Mass. Jan. 31, 2003) (Dkt. No. 188). Another statute relied upon by the government is 18 U.S.C. § 2332b, which prohibits serious attacks "transcending national boundaries" and was invoked against Zacarias Moussaoui. See Judgment, *United States* v. *Moussaoui*, No. 01-cr-455 (E.D. Va. May 4, 2006) (Dkt. No. 1854). Finally, in a case arising from a plot to bomb the subway station at 34th Street in Manhattan, the government won a conviction under 18 U.S.C. § 2332f, which prohibits the delivery, placement, discharge or detonation of an explosive or other lethal device on public property with the intent to cause death, serious injury or major economic loss. See *United States* v. *Siraj*, 468 F. Supp. 2d 408, 413-14 (E.D.N.Y. 2007).

Prosecutors have also charged alternative, readily provable crimes that do not require any proof that the defendant is linked to terrorism or violent crime.[5]

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[5] In addition, prosecutors frequently charge terrorists with violating generally-applicable statutes that criminalize violent conduct such as racketeering, aircraft piracy, arms dealing, and murder. See, *e.g.*, Judgment, *United States* v. *Abu Ali*, No. 05-cr-53 (E.D. Va. Apr. 17, 2006) (Dkt. No. 397) (30-year prison sentence for, inter alia, conspiracy to commit aircraft piracy and conspiracy to destroy an aircraft); Judgment, *United States* v. *Arnaout*, No. 02-cr-892 (N.D. Ill. Aug. 18, 2003) (Dkt. No. 213) (136-month prison sentence for racketeering). Many terrorism prosecutions have also included conspiracy charges. See *In Pursuit of Justice* at 54-56 (discussing application of conspiracy statutes in terrorism cases).

The DOJ has publicly embraced this strategy and has touted the use against terrorism defendants of statutes criminalizing immigration violations (18 U.S.C. § 1425), false statements (18 U.S.C. § 1001), and fraudulently obtaining travel documents (18 U.S.C. § 1546). U.S. Dep't of Justice, *2006 Counterterrorism White Paper* 29 (2006) ("DOJ Counterterrorism White Paper"). Charging such "alternative statutes" can offer numerous advantages in a particular case. For example, it may permit the government to arrest and detain individuals at an early stage, thus helping to prevent violent acts, and it can avoid the necessity of offering sensitive evidence or publicly revealing that an individual has been linked to terrorism, permitting investigations and intelligence-gathering to continue without risk of exposure. See *ibid.*; see also *In Pursuit of Justice*, at 51-54 (citing various authorities).

Petitioner's aborted criminal case provides an object lesson in the utility of charging "alternative statutes" against suspected terrorists. The government initially charged petitioner with a single count of access device fraud under 18 U.S.C. § 1029(a)(3). See Indictment at 1, *United States* v. *al-Marri*, No. 02-cr-147 ("*al-Marri I* Proceedings") (S.D.N.Y. Feb. 6, 2002) (Dkt. No. 4). This charge allowed prosecutors to successfully seek petitioner's pre-trial detention while affording time to develop the case further. The government subsequently obtained a second indictment that charged six counts: two counts of making false statements to the FBI under 18 U.S.C. § 1001(a)(1) and (2); three counts of making false statements to FDIC-insured banks under 18 U.S.C. § 1014; and one count of identity theft under 18 U.S.C. § 1028(a)(7). See Indictment, *United States* v. *al-Marri*, No. 03-cr-

94 ("*al-Marri II* Proceedings") (S.D.N.Y. Jan. 22, 2003) (Dkt. No. 5). These charges, all of which remained pending at the time petitioner was transferred into military custody, resulted in petitioner's continued pre-trial detention in New York and then Illinois. From the public record, there is little reason to doubt the strength of the evidence against petitioner or the viability of the charges against him. Indeed, his trial was only one month away when petitioner was whisked into military detention. See Scheduling Order, *United States* v. *al-Marri*, No. 03-cr-10044 ("*al-Marri III* Proceedings") (C.D. Ill. May 29, 2003) (Dkt. No. 7) (setting trial for July 21, 2003).

2. The criminal justice system has the capability to detain and incapacitate suspected terrorists

One of the proffered weaknesses of the justice system, and the justifications for military detention of alleged al Qaeda adherents like petitioner, is that the justice system does not have the tools to sufficiently incapacitate terrorists. Indeed, Judge Wilkinson's opinion all but assumed that the justice system has no viable means of detaining al-Marri and other suspects. See Pet. App. 210a-11a (criticizing reliance on justice system because "a *failure* to incapacitate individuals such as al-Marri may have dramatic consequences") (emphasis added). But Judge Wilkinson's assumption does not take account of the significant tools available to prosecutors, under settled law,

to arrest and detain dangerous individuals suspected of complicity in terrorism.[6]

First and foremost, when a defendant is charged with a federal crime, the government can seek to detain him on grounds that he presents a risk of flight or a danger to the community, and if the defendant is charged with a terrorism offense, the Bail Reform Act contains a legislatively mandated presumption that the defendant should be detained pending trial. See 18 U.S.C. § 3142(a), (e)(3)(B)-(C). Many terrorism defendants have been detained (see *In Pursuit of Justice*, at 24 (presenting data on bail decisions in terrorism cases)), and case law permits prolonged pre-trial detention if necessary (see *United States* v. *el-Hage*, 213 F.3d 74, 77-81 (CA2 2000) (approving pretrial detention anticipated to last between 30 and 33 months in Embassy Bombing case)). Indeed, petitioner himself was held without bail for approximately 18 months despite being charged with crimes such as identity theft and false statements to banks. See Ord. of Detention Pending Trial, *al-Marri I* Proceedings (Mar. 22, 2002) (Dkt. No. 6); Ord. of Detention Pending Trial, *al-Marri III* Proceedings (May. 29, 2002) (Dkt. No. 8).

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[6] In addition, under certain circumstances the law of war permits the government to capture and detain enemy combatants "to prevent captured individuals from returning to the field of battle and taking up arms once again." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 518 (2004) (opinion of O'Connor, J.); see also *ibid.* ("detention of individuals" who fought against the United States in Afghanistan as part of the Taliban is a "fundamental and accepted . . . incident to war" and may extend "for the duration of the particular conflict in which they were captured").

Upon conviction, defendants convicted of terrorism offenses are often subject to lengthy periods of incarceration. Terrorism statutes carry heavy maximum penalties, and the Sentencing Guidelines recommend significant penalties for terrorism-related crimes. See, *e.g.*, 18 U.S.C. § 2332b(c) (capital punishment available where death results, otherwise life or 25-, 30- or 35-year sentences available for various acts of terrorism transcending national boundaries); 18 U.S.C. §§ 2339A(a) & 2339B(a)(1) (life sentence available where death results, otherwise 15-year sentence available for material support); see U.S.S.G. § 3A1.4 (minimum offense level of 32 and criminal history category of VI for terrorism-related crimes, resulting a minimum recommendation of 210-262 months under U.S.S.G. Ch. 5, Pt. A). In practice, these provisions often translate into lengthy sentences for defendants who are convicted in terrorism cases. See *In Pursuit of Justice*, at 26 (presenting sentencing data).

Petitioner's own case illustrates the availability of substantial sentences in terrorism cases. Had the government successfully prosecuted petitioner on the Illinois charges, he would have been exposed to a maximum penalty of 146 years in prison: 10 years for access device fraud (see 18 U.S.C. § 1029(a)(3) & (c)(1)(A)(i)); 8 years for each of two counts of making false statements to the FBI (see 18 U.S.C. § 1001(a)); 30 years for each of three counts of making false statements to FDIC-insured banks (see 18 U.S.C. § 1014); and 30 years for one count of identity theft (see 18 U.S.C. § 1028(a)(7) & (b)(4)). The Declaration of Jeffrey N. Rapp, Director, Joint Intelligence Task Force for Combating Terrorism ("Rapp Declaration") asserts that petitioner's criminal conduct was "in

preparation for acts of international terrorism" (Resp. App. 19a), indicating that petitioner would have faced a recommended sentence of at least 210-262 months under the Sentencing Guidelines. See also Pet. for Cert. 3 n.1 (noting that § 3A1.4 would apply at sentencing). Of course, the sentencing court could lawfully have imposed a more severe (or more lenient) sentence than the one recommended by the Guidelines.

Aliens suspected of terrorist activity are subject to a second means of incapacitation—arrest and detention by the Attorney General pending removal proceedings. See 8 U.S.C. § 1226(a). Immigration detentions are either mandatory or subject to the unreviewable discretion of the Attorney General, depending on the immigration charges. See generally 8 U.S.C. § 1226. In cases of suspected terrorism, the government has often used immigration detention to complement its authority to detain under the criminal law. Zacarias Moussaoui, for example, was initially detained before 9/11 for overstaying his visa (see Nat'l Comm'n on Terrorist Attacks Upon the U.S., *The 9/11 Commission Report* at 273 (2004)), and the government can use immigration detention as a "backstop" when the bail statute would otherwise require a defendant's release. Compare Minute Entry, *United States* v. *al-Shannaq*, No. 02-cr-319 (D. Md. July 11, 2002) (releasing defendant Rasmi Subhi Salah al-Shannaq before trial) with Warren P. Strobel & Cassio Furtado, *3 in Visa Plot Have Hijack*

Links, Miami Herald, July 11, 2002, at 3A (al-Shannaq detained on immigration charges).[7]

Finally, in situations where the government cannot file criminal or immigration charges, it can invoke the material witness statute, 18 U.S.C. § 3144, to detain a potential witness for a limited time pending his testimony. Although the material witness statute may be used for only a limited period of time and imposes numerous procedural safeguards—including prompt and continuing judicial review and the appointment of counsel—it is an effective tool for the government in appropriate situations. See Serrin Turner & Stephen J. Schulhofer, Brennan Ctr. for Justice at N.Y.U. Sch. of L., *The Secrecy Problem in Terrorism Trials* 38 (2005); *United States* v. *Awadallah*, 349 F.3d 42, 45-48 (CA2 2003) (upholding perjury indictment of man detained as material witness after his phone number was found in a 9/11 hijacker's vehicle). Indeed, petitioner himself was originally arrested on a material witness warrant and was detained on that basis for approximately two months. See Pet. App. 12a-13a.

3. The criminal justice system adequately protects the secrecy of classified information

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[7] In addition, under Sections 411 and 412 of the USA Patriot Act, Congress authorized the arrest and detention of aliens believed to be connected to terrorism where no charges have been filed, but the statute requires the government to commence removal proceedings or to file criminal charges within seven days after arrest. See 8 U.S.C. §§ 1226a(a).

In his opinion below, Judge Wilkinson also expressed another, commonly leveled criticism of the justice system—that it is not "responsive to the executive's legitimate need to protect sensitive information." Pet. App. 215a. But as Judge Gregory explained in his concurrence, Judge Wilkinson and his fellow critics have given short shrift to "the statutory framework Congress created for handling classified material in a judicial setting, the Classified Information Procedures Act ('CIPA')." *Id.*, at 144a; see also *id.*, at 153a-55a (explaining how CIPA principles could be applied to govern al-Marri's proceedings).

CIPA establishes procedures that allow judges and cleared counsel to determine, before trial, how to manage classified evidence so that the defendant receives a fair trial while secret information is protected. See 18 U.S.C. app. 3; see also *In Pursuit of Justice*, at 82-84 (summarizing CIPA's provisions). Since the late 1980s, when the statute was first used in the terrorism context, courts have applied CIPA in a large number of terrorism cases, and we have found no documented evidence of serious breaches when CIPA procedures have been invoked. See *In Pursuit of Justice*, at 8-9 (summarizing findings); *id.*, at 84-86 (collecting cases).

Importantly, CIPA is neither exhaustive nor exclusive with respect to the use of classified testimony. Indeed, Congress's express intent in enacting CIPA was that district judges "'must be relied on to fashion creative and fair solutions to these problems,' *i.e.*, the problems raised by the use of classified information in trials." *United States* v. *Rosen*, 520 F. Supp. 2d 786, 788 (E.D. Va. 2007) (quoting S. Rep. 96-283, reprinted in 1980 U.S.C.C.A.N. 4294). In Moussaoui's

case, for example, the court faced the novel question of how to apply CIPA to a *pro se* defendant, and concluded that where CIPA would direct information to be disclosed to defense counsel but not the defendant, a *pro se* defendant would receive standby counsel to review the classified materials. See *United States* v. *Moussaoui*, No. 01-cr-455-A, 2002 WL 1987964, at *1 (E.D. Va. Aug. 23, 2002). Similarly, courts have permitted witnesses whose identity is secret to be referred to by a pseudonym, or to testify using a mask or some other method to shield the witness's identity. See, *e.g.*, *United States* v. *Moussaoui*, 382 F.3d 453, 480 n.37 (CA2 2004) (in order to protect national security, district court could allow the use of "alternate names for people or places" in creating substitutions for certain witnesses' proposed testimony).

In his opinion below, Judge Wilkinson deemed CIPA insufficient to protect classified information because judges "will fail to appreciate the broader dangers associated with a potentially sensitive piece of information." Pet. App. 218a. However, Judge Wilkinson's hypothesis is unsupported by evidence and ignores the government's role, under CIPA, in apprising the court of the risks posed by disclosure of classified evidence. In fact, under CIPA, the government can prevent the disclosure of classified information, though it runs the risk of sanctions if an acceptable substitute cannot be found. See 18 U.S.C. app. 3 § 6(e).

Judge Wilkinson's opinion also raised fears about the possibility of leaks, focusing in particular on two alleged examples of security breaches in terrorism cases. As set forth below, however, we believe the first such incident simply did not happen, and the

second does not illustrate flaws in CIPA, since CIPA's procedures were not even invoked.

The first incident cited by Judge Wilkinson supposedly occurred "during the criminal trial of Ramzi Yousef, [when] 'an apparently innocuous bit of testimony in a public courtroom about delivery of a cell phone battery was enough to tip off terrorists still at large that one of their communications links had been compromised.'" Pet. App. 218a-19a (quoting Mukasey, *supra*); see also *Boumediene* v. *Bush*, 128 S. Ct. 2229, 2295 (2008) (Scalia, J., dissenting) (referring to same anecdote). However, public-record information does not support the claim that this incident occurred, and based on our review of the record, we believe that it did not. Instead, it seems likely that the report of the incident has become garbled and that the "innocuous bit of testimony" actually occurred in the Embassy Bombings trial in March 2001 rather than in either of the Ramzi Yousef trials in 1996 and 1997. See Trial Tr. at 5292-94, *United States* v. *el-Hage*, No. 98-cr-1023 ("*el-Hage* Proceedings") (S.D.N.Y. May 1, 2001) (Dkt. No. 600) (government's closing argument discussing delivery of satellite phone battery pack to Bin Laden in May 1998). However, the evidence in the Embassy Bombings trial about the delivery of a satellite phone battery to Bin Laden could not have tipped off anyone that the phone was being monitored because the phone had already been inactive for almost two and a

half years when the government offered evidence about it at trial.[8]

The other example of a security breach cited by Judge Wilkinson is that "'in the course of prosecuting Omar Abdel Rahman . . . the government was compelled . . . to turn over a list of unindicted co-conspirators [including Osama bin Laden] to the defendants,'" and that within ten days, that list "was in bin Laden's hands, 'letting him know that his connection to that case had been discovered.'" Pet. App. 214a (quoting Mukasey, *supra*) (second ellipsis in opinion); see also *Boumediene*, 128 S. Ct., at 2295 (Scalia, J., dissenting) (recounting same report). Although the dissemination of the co-conspirators list did occur, it cannot fairly be used to criticize the effectiveness of CIPA because there is no indication that the government sought to invoke CIPA, or even a protective order, to restrict disclosure of the list. See *In Pursuit of Justice*, at 88. Had the government sought a court order sealing the list or prohibiting review by the defendants or anyone not working on the defense team, perhaps the list would not have reached Bin Laden.

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[8] Phone records received in evidence show that the phone's use dropped off in late August and September 1998, after the embassy bombings in East Africa and the U.S. cruise missile attack on Bin Laden, and that the phone went dead entirely on October 9, 1998. See Trial Tr. at 3035 & Gov't Ex. 594, *el-Hage* Proceedings (Mar. 20, 2001) (Dkt. No. 605) (testimony of witness from phone company; phone records). Yet the phone records were not offered in evidence until March 20, 2001. See *ibid.*; see also *In Pursuit of Justice* at 88-89.

In fact, in later terrorism cases, protective orders and other measures have been employed to restrict the dissemination of sensitive materials. For example, during petitioner's pre-trial detention, the government obtained a protective order limiting the release of sensitive information while charges were pending against him in the Southern District of New York. See Protective Order, *al-Marri II* Proceedings (Mar. 24, 2003) (Dkt. No. 9). Petitioner was also placed in a Special Housing Unit that limited his ability to communicate with the outside world for the duration of the New York proceedings. Once petitioner was moved to Illinois, the government imposed Special Administrative Measures, or "SAMs," that severely restricted his contact with the outside world.

In sum, there is "no indication that [CIPA], reasonably interpreted by federal judges, is inadequate to the task of protecting national security interests while affording defendants a fair trial." Ass'n of the Bar of the City of N.Y., *Indefinite Detention*, at 143. That is not to say, of course, that CIPA or judges are foolproof, but the risk of error does not support an argument that courts are inherently susceptible to security breaches.

4. The criminal justice system has displayed a practical and common-sense approach to evidentiary rules in terrorism cases

In his opinion below, Judge Wilkinson also criticized the justice system for imposing evidentiary strictures that are too rigid to allow for the kind of evidence that is available to prosecute terrorists. See, *e.g.*, Pet. App. 211a-12a ("The 'fog of war' creates confusion, and . . . it is often difficult to respect the evidentiary standards . . . that are the hallmarks of

criminal trials"). Judge Wilkinson identified two evidentiary problems as being particularly problematic in terrorism trials: the chain-of-custody requirement and securing witnesses for in-court testimony. *Ibid.* However, Judge Wilkinson cited no actual examples where evidentiary problems have proved insurmountable in terrorism cases.

In fact, many terrorism prosecutions present no unusual evidentiary problems. In petitioner's case, for example, a review of the Rapp Declaration and the criminal docket suggests that the principal evidence against petitioner was composed of emails and other data found in petitioner's computer; papers and other personal effects seized after a search of petitioner's home; phone records, financial and other banking records; records of business transactions; federal immigration records; and the defendant's statements to the FBI. See Resp. App. 9a-15a; Compl., *al-Marri III* Proceedings (May 1, 2003) (Dkt. No. 1) ("Ill. Compl."). These are bread-and-butter pieces of evidence whose admission would not seem to present any special difficulty.[9]

Further, experience shows that both of the specific evidentiary issues cited by Judge Wilkinson have

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[9] While his case was pending in the Southern District of New York, petitioner moved to suppress the physical evidence recovered by the government in searches of his home and automobile. See Suppression Motion, *al-Marri I* Proceedings (June 25, 2002) (Dkt. No. 16). After holding an evidentiary hearing, however, the district court denied petitioner's motion to suppress on grounds that he had consented to the searches. See Decision and Order, *al-Marri I* Proceedings (Nov. 12, 2002) (Dkt. No. 30).

proved to be surmountable. For example, in *United States* v. *al-Moayad*, a terrorist-financing case in the Eastern District of New York, the prosecution rebutted the defendant's entrapment defense by submitting into evidence what "appeared to be an application form for a mujahidin training camp" that listed the defendant as a reference. 545 F.3d 139, 156 (CA2 2008). The government "authenticated the form through the testimony of FBI Special Agent Jennifer Hale Keenan," who testified that it was among a number of items she received, while she was stationed in Pakistan, from American officials in Afghanistan who had in turn seized those items from an al Qaeda training facility. *Ibid.* Although the Second Circuit reversed al-Moayad's conviction based on other trial errors, it found that Hale Keenan's testimony sufficiently authenticated the mujahidin form, even though she simply described "the process of receiving, inventorying, and shipping the documents to Washington D.C." *Id.*, at 156, 172-73 (noting that the "bar for authentication of evidence is not particularly high"); see also Peter Whoriskey, *Defense Cites Ambiguities in Evidence Against Padilla*, Wash. Post, May 19, 2007, at A06 (describing trial court's acceptance of alleged al Qaeda training camp application into evidence).

The Fourth Circuit's recent *Abu Ali* opinion offers a good example of the manner in which courts can overcome problems with witness availability. See *Abu Ali*, 528 F.3d, at 238-42. Two of the witnesses against Abu Ali were Saudi government agents who had interrogated Abu Ali and obtained confessions, but who were not authorized to travel to the United States. *Id.*, at 238-40. The trial court allowed Abu Ali's attorneys to depose the Saudi agents via a two-

way video link subject to procedural protections, including: (1) the presence of attorneys for both parties in Saudi Arabia, along with a translator; (2) real-time transcription of the depositions; and (3) frequent breaks during which Abu Ali was able to communicate with his counsel in Saudi Arabia via cell phone. *Id.*, at 239-40. The Fourth Circuit found that the trial court's protections satisfied Abu Ali's Sixth Amendment Confrontation Clause rights. *Id.*, at 240-42.

Courts and prosecutors have also been able to obtain the presence of active-duty U.S. military personnel when necessary. In *al-Moayad*, the FBI agent who conducted much of the investigation was recalled to testify at trial in Brooklyn, even though at the time of trial he was on active duty in Iraq as a Marine captain where he was stationed in the so-called "Triangle of Death." *In Pursuit of Justice*, at 109; John H. Richardson, *Brian Murphy v. The Bad Guys*, Esquire, Feb. 26, 2007. Similarly, in the case of John Walker Lindh, active-duty military personnel, including Special Forces officers, were ready, willing, and able to testify at John Walker Lindh's suppression hearing; their testimony was not necessary in light of Lindh's guilty plea shortly before the hearing was to commence. See *In Pursuit of Justice*, at 109.

5. The criminal justice system adequately protects the safety and security of both its participants and the public at large

Judge Wilkinson also expressed doubts about the justice system's ability to provide safety and security for trial participants and for the public at large (see Pet. App. 214a-15a), but he cited no specific examples of security breakdowns. Although safety in the

courtroom can indeed be a serious concern, experience suggests little reason to conclude that terrorism cases present courtroom security risks that are not manageable. Indeed, many of the most serious security breakdowns have occurred following non-terrorism-related civil or criminal litigation. See *In Pursuit of Justice*, at 121-22 (citing examples).

In appropriate cases, judges and security officials can invoke a series of extra precautions to maintain safety, including extra metal detectors and court security officers, physical restraints on defendants, and anonymous juries. See *Holbrook* v. *Flynn*, 475 U.S. 560, 570-72 (1986) (additional, uniformed officers did not prevent fair trial); *Illinois* v. *Allen*, 397 U.S. 337, 343-44 (1970) (authorizing physical restraints in extreme cases); *United States* v. *Wong*, 40 F.3d 1347, 1376 (CA2 1994) (approving use of anonymous juries in appropriate cases and subject to reasonable precautions to minimize prejudice to the defendant). Witnesses, in turn, can be protected through a variety of measures including the U.S. Marshals Service's Witness Security Program, which since 1971 has successfully protected, relocated, and given new identities to over 8,000 at-risk witnesses (and their families); indeed, no participant following the program's security guidelines has ever been harmed, and an 89% conviction rate has been achieved in cases where protected witnesses testified. See U.S. Marshals Service, *Witness Security Program Fact Sheet* (Dec. 3,

2007);[10] U.S. Marshals Service, Website, *Witness Security*.[11]

Judge Wilkinson's opinion also raised a separate kind of security concern—that "[t]error suspects may use the bully pulpit of a criminal trial in an attempt to recruit others to their cause." Pet. App. 214a. However, we are not aware of any factual basis for this concern or any discernible propaganda benefit conferred upon terrorists or their causes by court trials. To the contrary, the Executive's refusal to use the justice system in some terrorism cases—along with the use of extrajudicial mechanisms such as detention at Guantanamo and military tribunals—has apparently been the real propaganda bonanza for al Qaeda and other terrorist groups.

Finally, the government can impose SAMs, which aim to prevent inmates from sending communications to persons outside the prison system that may create a risk of violence or terrorism. See 28 C.F.R. § 501.3(a). SAMs may include housing a prisoner in administrative segregation, as well as denying privileges such as "correspondence, visiting, interviews with representatives of the news media, and use of the telephone." *Ibid.* SAMs have been imposed during pre-trial detention in a number of terrorism cases. See, *e.g.*, *United States* v. *el-Hage*, 213 F.3d 74, 78, 81-82 (CA2 2000). Petitioner, too, was subject to SAMs after his transfer to federal custody in Illinois. Indeed, his counsel was preparing to litigate the SAMs when petitioner was transferred into mili-

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[10] http://www.usmarshals.gov/duties/factsheets/witsec.pdf

[11] http://www.usmarshals.gov/duties/witsec.htm

tary custody. See Letter from Pet'r's Counsel to Gov't (June 4, 2003) (attached as Ex. 5 to Pet. for *Habeas Corpus, al-Marri* v. *Bush*, No. 03-cv-1220 (C.D. Ill. July 8, 2003) ("July 8 *Habeas* Pet.")); see also July 8 *Habeas* Pet., at 8-10.

6. Prosecutors can develop reliable intelligence information by debriefing cooperating defendants

As a final matter, Judge Wilkinson opined that defendants' rights to speedy trial and immediate assistance of counsel could "hinder the government's need to gather information" because "effective . . . interrogation[] typically takes time" during which the suspect must be held incommunicado. Pet. App. 213a. However, this argument ignores the reliable intelligence that has been derived from cooperating defendants in terrorism cases. In a webpage devoted to "Waging the War on Terror," the Department of Justice touts its ability to gather information "by leveraging criminal charges and long prison sentences." U.S. Dep't of Justice, Website, *Waging the War on Terror*.[12] According to the site, cooperating defendants "have provided critical intelligence about al-Qaida and other terrorist groups, safehouses, training camps, recruitment, and tactics in the United States, and the operations of those terrorists who mean to do Americans harm." *Ibid.* Furthermore, as those familiar with the criminal justice system are well aware, prosecutors must corroborate the infor-

[12] http://www.lifeandliberty.gov/subs/a_terr.htm

mation gained from cooperating defendants so that they can withstand cross-examination.

One example of a successful cooperator is Yahya Goba, one of six defendants indicted in the Lackawanna Six case. Goba agreed to cooperate with the government and pled guilty in March 2003 to providing material support to al Qaeda in connection with his attendance at an al Qaeda training camp in Afghanistan. See Plea Agreement, *United States v. Goba*, No. 02-cr-214 ("*Goba* Proceedings") (W.D.N.Y. Mar. 25, 2003) (Dkt. No. 113); Change of Plea, *Goba* Proceedings (Mar. 25, 2003) (Dkt. No. 116). He later testified as a government witness at the trials of Mohammed al-Moayad and Jose Padilla, and in other cases as well. See *al-Moayad*, 545 F.3d, at 156-57; Decision and Order as to Yahya Goba, *Goba* Proceedings (Dec. 14, 2007) (Dkt. No. 288); see also Plea Agreement, *United States* v. *Qureshi*, No. 04-cr-60057 (W.D. La. Feb. 11, 2005) (Dkt. No. 31) & DOJ Counterterrorism White Paper, at 30 (discussing Mohammad Salman Farooq Qureshi's proffer about al Qaeda member Wadih el-Hage and an organization that may have assisted in financing the embassy bombings in Kenya and Tanzania).

C. The Government Will Very Likely Be Able to Prosecute Petitioner After Releasing Him From Military Custody

The original criminal charges against petitioner were dismissed with prejudice at the government's request. See Order of Dismissal & Tr. of Proceedings at 10-16, *al-Marri III* Proceedings (June 23, 2003) (Dkt. Nos. 16, 17). Nevertheless, a review of the allegations against petitioner suggests that the govern-

ment could probably bring new charges against him under several different statutes.

First, the allegations, if backed by evidence, appear to support a charge of providing material support to a terrorist organization in violation of 18 U.S.C. §§ 2339A and/or 2339B. Between 1996 and 1998, petitioner is alleged to have trained at al Qaeda camps in Afghanistan where, among other things, he allegedly received training in the use of poisons. Resp. App. 6a. In the summer of 2001, petitioner allegedly volunteered to carry out a terrorist attack on behalf of al Qaeda. *Id.*, at 7a. According to the Rapp Declaration, al-Qaeda "instructed al-Marri to explore possibilities for hacking into the main-frame computers of banks with the objective of wreaking havoc on U.S. banking records and thus damaging the country's economy." *Id.*, at 8a. Petitioner then allegedly moved to the United States. *Id.*, at 5a. When his laptop computer was later seized, it was, according to the government's allegations, found to contain "numerous computer programs typically used by computer hackers," suggesting that petitioner had undertaken to do as al Qaeda instructed. *Id.*, at 13a. Furthermore, petitioner's alleged computer contents indicated that he had researched the use of chemical weapons in contemplation of a terrorist attack, research that was "consistent with the documented interests of al Qaeda" and thus may have been carried out on al Qaeda's behalf. *Id.*, at 9a-10a.

Evidence of petitioner's contacts with other al Qaeda figures, and his surreptitious conduct, could further bolster a material support prosecution. For example, after he entered the United States, petitioner allegedly called a telephone number in the

United Arab Emirates (UAE) that was used by Mustafa Ahmed al-Hawsawi, an alleged al Qaeda financier and co-conspirator of Zacarias Moussaoui's. *Id.*, at 4a-5a, 8a. The UAE number was also used on a Federal Express package sent by 9/11 hijacker Mohammed Atta and in connection with other alleged al Qaeda figures. See Ill. Compl., at 8. Further, petitioner allegedly met with al-Hawsawi in Dubai in August 2001 and received funds from him, including the funds used to purchase the seized laptop. Resp. App. 8a.

A material support prosecution could further rely on the allegations of petitioner's surreptitious behavior. For example, petitioner allegedly used an alias, "Abdullakareem A. Almuslam," to stay at a hotel which was used in turn as the home address for this alias in connection with the opening of fraudulent bank accounts for a company, "AAA Carpet." *Id.*, at 17a.[13] Further, petitioner allegedly admitted to creating three email accounts under false names. Each of these accounts contained a draft message with a coded version of petitioner's telephone number and addressed to an email account associated with Khalid Shaykh Muhammed. *Id.*, at 11a-12a. There is also evidence which, if proven, would show that petitioner surreptitiously entered the United States in 2000 and then lied about it. See Ill. Compl., at 16-17.

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[13] Two witnesses who were shown photographic arrays have allegedly identified petitioner as the individual known as Abdullakareem Almuslam. Resp. App 17a (first witness); Ill. Compl. at 14 (second witness).

If proven, petitioner's travel on behalf of al Qaeda, his research into available methods for carrying out a terrorist attack, and his volunteering to work on al Qaeda's behalf in the first place would likely constitute material support. See, *e.g.*, Judgment, *United States* v. *Faris*, No. 03-cr-189 (E.D. Va. Apr. 30, 2003) (Dkt. No. 34) (judgment entered where defendant charged with material support and plea agreement entered after defendant scouted Brooklyn Bridge for possible terrorist attack). Furthermore, petitioner's alleged agreement with members of al Qaeda that he would assist them and the al Qaeda organization in carrying out a terrorist attack would likely support a charge of conspiracy to provide material support under the same statutes. See, *e.g.*, Superseding Information & Plea Agreements, *Ahmed* Proceedings (Jan. 15, 2009) (Dkt. Nos. 129, 132, 133) & Ahmed Press Release (defendants agreed to travel overseas to kill U.S. soldiers).[14] Because the material support statutes have an eight-year limitations period (see 18 U.S.C. § 3286(a)), the government need

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[14] Conspiracy to provide material support to a designated terrorist organization was prohibited by § 2339B at the time of the alleged agreement. Conspiracy to provide material support to terrorists was prohibited by 18 U.S.C. § 371 at the time of the alleged agreement; the conspiracy was evidently still ongoing after October 26, 2001, when Congress extended the maximum sentence and statute of limitations applicable to such conspiracies by adding a specific conspiracy provision to § 2339A. *See* USA Patriot Act, Pub. L. No. 107-56, § 811(f), 115 Stat. 272, 381 (2001).

only charge petitioner before the summer of 2009 to avoid a limitations problem.[15]

Second, the allegations suggest that the government could charge petitioner with mail fraud or attempted mail fraud under 18 U.S.C. §§ 1341 and 1349. Petitioner's alleged wrongdoing will likely have caused credit card issuers to seek payment from account holders by sending statements containing the wrongful charges through the mails. Furthermore, a grand jury found that petitioner applied for several bank accounts using a false name and a false mailing address at which he would "receive documents related to the bank accounts he intended to open." Indictment at 1, *al-Marri III* Proceedings (May 22, 2003). Petitioner's alleged use of the mail was seemingly intended to further his fraudulent scheme to make charges against credit card numbers, and so would support a charge of mail fraud. See Ill. Compl., at 14-15. Mail fraud has a 10-year limitations period where the fraud affects a financial institution. See 18 U.S.C. § 3293(2). In this case, then, the statute of limitations would extend at a minimum into 2011.

Finally, the allegations would likely sustain a charge of wire fraud under 18 U.S.C. § 1343, which similarly has a 10-year limitations period where the fraud affects a financial institution. Petitioner allegedly opened an account with a credit card processor,

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[15] In addition, the government may toll the statute for an additional three years if it seeks evidence from abroad (see 18 U.S.C. § 3292(a)(1)), as it could presumably do in petitioner's case. See Resp. App. 7a (petitioner allegedly volunteered for terrorist mission while in UAE).

through which he attempted to make charges against several of the stolen credit card numbers the government found when it seized his computer. See Ill. Compl., at 14-15. Transmitting the fraudulent charges to the credit card processor via wire could likely support a charge of wire fraud.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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In The
Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,

Petitioner,

v.

COMMANDER DANIEL SPAGONE,
U.S.N., Consolidated Naval Brig.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE CATO INSTITUTE, THE CONSTITUTION PROJECT, AND THE RUTHERFORD INSTITUTE, AS *AMICI CURIAE* IN SUPPORT OF REVERSAL

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BOTH HAWDXW

QUESTION PRESENTED

Whether the Executive's use of military power inside the United States to detain, without charge or trial, a person who is lawfully in the United States violates the Constitution where Congress has not expressly authorized such detention.

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BRIEF OF THE CATO INSTITUTE, THE CONSTITUTION PROJECT, AND THE RUTHERFORD INSTITUTE, AS *AMICI CURIAE* IN SUPPORT OF REVERSAL

The Cato Institute, The Constitution Project, and The Rutherford Institute respectfully submit this brief as *amici curiae* in support of reversal.

INTERESTS OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward those ends, the Cato Institute publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs with the courts. Because the instant case raises vital questions about separation of powers principles, this case is of central concern to the Cato Institute.

The Constitution Project is an independent, bi-partisan think tank which creates coalitions of

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[1] Pursuant to Rule 37.3(a), letters from the parties consenting to the filing of this brief are being filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

respected leaders from across the political spectrum to issue consensus recommendations for policy reforms. The Project's Liberty and Security Committee—a bipartisan, blue-ribbon group of prominent Americans—addresses the importance of preserving both national security and civil liberties. In July 2004, this committee issued a *Report on Post-9/11 Detentions* in which its signatories urged that "[a]ny detention of a citizen or non-citizen in the United States must be expressly authorized by congressional statute or by the law of war," and that "[t]he courts of the United States must be available to hear claims of detainees that they are being held or treated in violation of the law."[2] In addition, in 2005, the Project's bipartisan War Powers Committee released *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances*, a report analyzing the respective powers of all three branches of government during wartime.[3]

The Rutherford Institute is an international civil liberties organization that was founded in 1982 by its President, John W. Whitehead. The Rutherford Institute specializes in providing legal representation

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[2] Liberty & Security Initiative, The Constitution Project, *Report on Post-9/11 Detentions* 20 (2004). The report and the attached list of signatories are available at http://www.constitutionproject.org/pdf/report_on_post_9_11_detentions.pdf.

[3] The report and list of signatories are available at http://www.constitutionproject.org/pdf/War_Powers_Deciding_To_Use_Force_Abroad.pdf.

without charge to individuals whose civil liberties are threatened or violated and in educating the public about constitutional and human rights issues. During its 26-year history, attorneys affiliated with The Rutherford Institute have represented numerous parties before this Court. The Institute has also filed *amicus curiae* briefs in cases dealing with important constitutional issues arising from the current efforts to combat terrorism. *See, e.g.*, *Munaf v. Geren*, 128 S. Ct. 2207 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004).

SUMMARY OF ARGUMENT

The government has claimed, and the fractured *en banc* Fourth Circuit erroneously concluded, that the President has authority to use the military to detain, without charge or trial, persons who are lawfully in the United States and who have allegedly engaged in terrorism-related conduct.

There is no such authority—not in any Act of Congress nor in the Constitution. Thus, neither the government's claim nor the ruling below can be sustained.

A.

The government has pointed to the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001), as the source of congressional authorization for its use of the military for domestic detention, but that statute is silent on the issue and

speaks only in general terms about use of military force. It does not satisfy the Court's clear statement rule that requires Congress to expressly authorize the Executive's use of military detention power in lieu of civilian criminal prosecution within the domestic sphere. This Court has never inferred such an authorization from general declarations of military force by Congress.

This Court's conclusion in *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004), that the AUMF implicitly authorizes certain military detentions does not govern the instant case because the ruling in *Hamdi* applies only to the military detention of persons taken prisoner on a foreign battlefield, inside a zone of active combat. *Hamdi* does not extend to the military detention of individuals who are lawfully in the United States, far from the foreign battlefield.

It is the USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, that granted the Executive authority to detain terrorism suspects present in the United States. Congress considered the Patriot Act contemporaneously with the AUMF and enacted it a few weeks later. The Patriot Act does not authorize Executive detention in the United States *by use of the military* without charge or trial, and the government makes no such contention.

The government's reading of the AUMF to authorize the domestic military detention it seeks in this case would render superfluous Congress's enactment of the more specific domestic detention

provisions of the Patriot Act. The legislative history of the Patriot Act demonstrates that Congress intended the Patriot Act, not the AUMF, to provide the President with detention power over terror suspects who are in the United States lawfully. It also demonstrates that Congress considered—and declined to grant—the military detention power that the government now claims.

B.

Lacking express congressional authorization, the government has asserted that the Executive has the inherent authority under the Commander-in-Chief Clause in Article II of the Constitution to use the military to detain persons who are lawfully in the United States. But the Commander-in-Chief Clause grants no such authority. Under the Constitution, the use of military power is a shared responsibility between the Legislature and the Executive, and even the President's broad power to wage war overseas as Commander-in-Chief requires congressional authorization.

This constitutional diffusion of government power regarding the use of the military reflects the Framers' desire to guard against any threats to democratic government posed by standing armies controlled by a potentially tyrannical Executive. And this constitutional structure confirms the need for explicit authorization from Congress for the President

to use the military to detain without charge or trial persons who are lawfully in the United States.

C.

Allowing the Executive to use the military to detain, without charge or trial, persons who are lawfully in the United States could give rise to manipulation of the civilian criminal justice system. Such manipulation threatens the constitutionally protected liberty of every person who is lawfully in the United States, including American citizens.

ARGUMENT

THE EXECUTIVE'S USE OF MILITARY POWER TO DETAIN WITHOUT CHARGE OR TRIAL PERSONS WHO ARE LAWFULLY IN THE UNITED STATES IS NOT AUTHORIZED BY CONGRESS OR BY THE CONSTITUTION

It is well settled that, under our constitutional system of disaggregated government power, the authority of the Executive, even in wartime, must derive either from an act of Congress or from the Constitution. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). This is so because "the Constitution diffuses power * * * to secure liberty." *Id.* at 635 (Jackson, J., concurring).

Consistent with that basic tenet, this Court has repeatedly viewed with great suspicion any attempt

by the Executive to exercise its power to use the military in the domestic sphere without congressional authorization. Moreover, this Court has recognized that the preservation of individual rights requires strict enforcement of the checks-and-balances in our constitutional system, by requiring a clear statement from Congress or explicit constitutional authority derived from Article II, before the President may use military power against persons who are lawfully in the United States.

These fundamental separation-of-powers principles require that the judgment of the court of appeals be reversed. The deeply fractured Fourth Circuit *en banc* court was wrong when it concluded that "Congress has empowered the President to detain [petitioner] as an enemy combatant." Pet. App. 7a. It was wrong because the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), on which it relied, does not expressly grant the President the authority to use the military to detain without charge or trial persons who are lawfully in the United States, far from the foreign battlefield. Lack of express congressional authorization is fatal to the government's case because the President's authority as Commander-in-Chief under Article II provides no such power.

A. Congress Has Not Authorized The Executive To Use The Military To Detain Without Charge Or Trial Persons Who Are Lawfully In The United States

1. The AUMF does not authorize such detention

The Executive has erred in its claim that the AUMF grants it the power to use the military to detain as "enemy combatants," without charge or trial, persons who are lawfully in the United States.

The AUMF was passed by Congress on September 14, 2001, as an immediate response to the September 11th terrorist attacks against the United States. The AUMF provides the President with the authority

> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

§ 2(a), 115 Stat. at 224.

This plain language does not support the ruling below. The AUMF is a general authorization for the use of military force. It does not explicitly authorize the President to use the military to detain without

charge or trial persons who are lawfully in the United States.

2. The court of appeals' ruling violates longstanding principles that require a clear statement from Congress when it authorizes the Executive to curtail individual rights

a. The government has argued that this Court should infer from the circumstances surrounding enactment of the AUMF congressional authorization for the domestic military detention power claimed here. *See* Br. in Op. 23. But this Court's clear statement requirement plainly precludes any such inference.

For more than 60 years, this Court has held that grants of power to the Executive that have the potential to weaken or remove enshrined constitutional protections—such as the right not to be detained by the military without due process (the right at issue here)—must be clearly stated by Congress. *See Ex parte Endo*, 323 U.S. 283, 300 (1944) ("We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was *clearly and unmistakably* indicated by the language they used." (emphasis added)).

This requirement of a clear statement from Congress "facilitates a dialogue between Congress

and the Court," *Boumediene v. Bush*, 128 S. Ct. 2229, 2243 (2008), and it serves as a critical check on the overreaching that is threatened by the President's use of military power to detain persons who are lawfully in the United States. *See Kent v. Dulles*, 357 U.S. 116, 129 (1958) ("We hesitate to find in [a] broad generalized power an authority to trench so heavily on the rights of the citizen."); *Greene v. McElroy*, 360 U.S. 474, 506 (1959) (holding that clear statements are required "not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws." (citation omitted)).

This Court has not hesitated to adhere to the clear statement requirement to preclude domestic military detention of persons during times of national crisis. In *Ex parte Endo*, this Court held that a statute that ratified an executive order directing the "exclu[sion]" of persons of Japanese ancestry from the West Coast during World War II was not sufficiently explicit with regard to "detention" as to authorize the military internment of loyal, law-abiding United States citizens, or to support inferring such internment authority. *See* 323 U.S. at 300 ("In interpreting a war-time measure we must assume that [Congress's] purpose was to allow for the greatest possible accommodation between * * * liberties and the exigencies of war.").

Similarly, in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), this Court refused to construe Congress's statutory authorization for the governor of Hawaii to declare "martial law" when there was an imminent threat of a military invasion as a grant of power for the governor to use military tribunals to resolve domestic criminal cases after the attack on Pearl Harbor. *See id.* at 316-317, 324 (refusing to assume that, by explicitly authorizing the imposition of "martial law," Congress intended to permit the governor to transgress the "boundaries between military and civilian power, in which our people always believed" and "which ha[ve] become part of our political philosophy and institutions").

Congress has acted in accordance with the clear statement requirement on other occasions when it has used clear and unmistakable language to vest the Executive with the power to detain persons who are lawfully residing in the United States, and even when such detention involves the use of civilian authority. In the Emergency Detention Act of 1950, ch. 1024, tit. II, § 100, 64 Stat. 1019 (EDA) (codified at 50 U.S.C. §§ 811-826 (1970)) (repealed 1971), for example, Congress explicitly authorized the Attorney General to "apprehend and by order detain * * * each person as to whom there is reasonable grounds to believe * * * probably will engage in, or probably will conspire with others to engage in, acts of espionage or sabotage." *Id.* § 103, 64 Stat. at 1021; *see also* the Alien Enemy Act, ch. 66, 1 Stat. 577 (1798) (codified at 50 U.S.C. § 21) (authorizing the President to

apprehend, restrain, secure, and remove resident aliens who are inside the United States if their home country is in a declared war with the United States).

Moreover, when Congress expressly authorizes detention by the Executive it typically provides explicit procedural safeguards, such as preliminary hearings and ongoing judicial review. *See*, *e.g.*, 18 U.S.C. § 3142(f) (mandating a judicial hearing—with the right to be represented by counsel, to testify, to present witnesses, and to cross-examine witnesses—within five days of a detention on a material witness warrant under 18 U.S.C. § 3144); EDA, §§ 102(b), 104(d), 109(b), 111, 64 Stat. at 1021-1029 (requiring a public presidential proclamation of an "Internal Security Emergency" to trigger the Act's detention provisions, which mandate a preliminary hearing within a reasonable time, provide an opportunity to consult counsel and to cross-examine witnesses, and permit appellate review by an executive board within 45 days, subject to further review by a court on appeal or via *habeas corpus*).

The AUMF fails to satisfy the clear statement mandate because nothing in the text comes close to authorizing the President to do what the ruling below allows; namely, to use the military to detain persons who are lawfully in the United States apart from the criminal justice system and to subject them to such ongoing detention without charge or trial. In addition, the text of the AUMF does not provide any procedural safeguards whatsoever for persons whom

the Executive chooses to detain through domestic use of the military—a silence that speaks volumes about the fact that Congress did not intend the AUMF to authorize the Executive to have the power to impose military detention without charge or trial on persons who are lawfully in the United States.

b. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), is not to the contrary. In *Hamdi*, a plurality of the Court concluded that the AUMF authorizes the military detention without charge or trial of persons who are captured on a foreign battlefield while actively taking up arms against the United States. The plurality opinion made clear that its conclusion followed *only* from "the narrow circumstances alleged" in that case. *Id.* at 509. That ruling cannot be viewed as controlling with regard to persons who, unlike Hamdi, are lawfully in the United States at the time they are arrested and have never taken up arms against the United States on a battlefield.

As the plurality opinion emphasized, Hamdi, a United States citizen, was apprehended in Afghanistan—"a *foreign* combat zone," *id.* at 523—while he was allegedly "carrying a weapon against American troops on a foreign battlefield," *id.* at 522 n.1. Because such conduct indisputably qualified Hamdi for "enemy combatant" status under established principles of international law, *id.* at 518, the plurality concluded that the AUMF implicitly conferred on the Executive the authority to detain such individuals, even United States citizens,

apprehended under like circumstances, *see id.* at 517-518. The *Hamdi* plurality's carefully limited ruling that the AUMF authorizes the Executive to use the military to detain "individuals in the narrow category" of persons who are captured while actively fighting on a foreign battlefield against United States military forces, *id.* at 517, says nothing about whether a person who is lawfully in the United States, far from a battlefield, can be detained by the military without charge or trial, rather than being arrested and prosecuted in the civilian criminal justice system.

The *Hamdi* plurality also expressly distinguished *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), in a manner that confirms that the AUMF's detention authorization should not be construed to authorize the detention at issue in this case. *Milligan* involved the apprehension, detention, and military trial of an individual who was apprehended on peaceful territory within the United States but accused of subversive conduct in support of the Confederacy during the Civil War. This Court rejected the government's contention that, as a traditional incident of war, the Executive could convene a military tribunal to try Milligan, 71 U.S. at 131, which is essentially the same claim that the government makes here with regard to military detention. The Court in *Milligan* reasoned that the use of military authority was not proper because Milligan was not apprehended while in a State that was in rebellion, and because even dangerous and

subversive behavior on the part of a person who is lawfully in the United States does not suffice to transform peaceful territory within the United States into a battlefield. *See Ex parte Milligan*, 71 U.S. at 127 (rejecting the existence of "actual war" in Indiana because it was not subjected to foreign invasion, civil war, or an overthrow of the national authority).

Moreover, the *Hamdi* plurality specifically found that the fact that Milligan "was *not* a prisoner of war, but a resident of Indiana arrested while at home there" to be "*central*" to the Court's conclusion in *Milligan* that trial by military tribunal was improper. *Hamdi*, 542 U.S. at 522 (emphasis added). The plurality emphasized that "[h]ad Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different." *Ibid.*

3. This Court has not previously construed a general congressional authorization for the use of military force, like the AUMF, to confer upon the Executive the power to use the military to detain without charge or trial persons who are lawfully in the United States

a. The ruling below represents a sea change with regard to the scope and effect of congressional authorizations for the use of military force. This Court has never held that a general authorization to

use military force by Congress permits the Executive to use the military to detain persons who are lawfully in the United States.

As far back as the War of 1812, the Court rejected attempts by the government to use such a general authorization for use of military force as a justification to seize enemy property or persons inside the United States. In *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), the Court addressed a declaration of war by Congress that authorized the President "to use the whole land and naval force of the United States to carry [war against the United Kingdom of Great Britain and Ireland] into effect." Declaration of War against the United Kingdom, ch. 102, 2 Stat. 755 (1812). The Court held that this general declaration was *not* sufficient to authorize the government to seize as "enemy property" in the United States certain British-owned cargo scheduled to be transported to England. The Court reasoned that the Executive's power to confiscate property, like its power to seize persons, can be asserted only "in execution of some existing law." *Brown*, 12 U.S. at 122, 123. To underscore its conclusion that the Executive "did not possess the[] powers [to seize property or persons] by virtue of the declaration of war," the Court relied in part on the fact that Congress had separately enacted specific legislation that authorized the military detention of enemy aliens. *Id.* at 126. Enactment by Congress of such a law to authorize detention of enemy aliens would not

have been necessary if a general declaration of war was sufficient authority for detention. *See ibid.* ("War gives an equal right over persons and property: and if its declaration is not considered as prescribing a law respecting the person of an enemy found in our country, neither does it prescribe a law for his property.").[4]

This Court's refusal to view a general authorization by Congress for the use of force as specific congressional authority for the Executive's exertion of military authority over individuals in the United States has persisted through subsequent armed conflicts. The Court consistently has maintained that Congress must expressly authorize the substitution of military process for civilian judicial process with regard to persons apprehended inside the United States. In *Ex parte Milligan*, 71 U.S. at 121-122, the Court ruled that there was no congressional authorization for military trials, and this was so despite the fact that President Lincoln's use of military power had been ratified by Congress,

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[4] Notably, the *Brown* Court ruled that a general declaration authorizing military force was not sufficient to permit seizure of enemy property *even though international law clearly made such property subject to confiscation*. This renders even less persuasive the government's contention here that the broad language of the AUMF authorizes the military seizure of persons who are in the United States, far from a battlefield, and therefore do not clearly qualify as "combatants" subject to detention under international law.

see Act of 1861, ch. 63, § 3, 12 Stat. 326 (1861), and Congress had suspended the writ of habeas corpus, *see* An Act Relating To Habeas Corpus, ch. 81, 12 Stat. 755 (1863).

In *Duncan*, 327 U.S. at 324, this Court did not mention, much less examine, Congress's broad authorization for the President to use force against Japan during World War II when it held that there was no congressional authorization for the imposition of a military judicial system in Hawaii after the Pearl Harbor attack. *See Duncan*, 327 U.S. at 313, 324. Moreover, in *Ex parte Endo*, 323 U.S. at 303-304, this Court rejected the contention that Congress had authorized the Executive's detention of loyal citizens of Japanese ancestry, despite the existence of a use-of-force declaration so expansive in scope that it authorized the President "to employ the entire naval and military forces of the United States and the resources of the Government" in the war against Japan and also pledged "all the resources of the country" to "bring the conflict to a successful termination." *See* Joint Resolution Declaring a State of War Against the Imperial Government of Japan, Pub. L. No. 77-328, 55 Stat. 795 (1941).

b. The reasoning of *Ex parte Quirin*, 317 U.S. 1 (1942)—on which the government has relied heavily—has been subject to pointed criticism. *See, e.g.*, *Hamdi*, 542 U.S. at 569 (Scalia, J., dissenting) (*Quirin* "was not this Court's finest hour"). It is also inapposite.

Quirin did not rely on a general authorization for the use of military force. Rather, it construed a set of statutory provisions enacted by Congress that expressly authorized the Executive to conduct military trials under certain circumstances. *See Quirin*, 317 U.S. at 26-27. Congress had also declared that the United States was at war with Germany, *see* Declaration of State of War with Germany, Pub. L. No. 77-331, 55 Stat. 796 (1941), and had expressly "pledged all of the resources of the country" to the President for use in conducting that war. *Id.* at 795. But this Court did *not* rely upon that general declaration to rule that the government was authorized to conduct military trials of the defendants, who had been apprehended in the United States. Rather, the Court held that more specific provisions of Articles 2 and 12 of the Articles of War, which were distinct from the general declaration of war, authorized the government to conduct military trials in the United States with respect to "any * * * person who by the law of war is subject to trial by military tribunal[ ]." *Quirin*, 317 U.S. at 27 (citation and internal quotation marks omitted).

Furthermore, in contrast to the use of military detention power in the domestic sphere that the Executive claims the AUMF provides, *Quirin* explicitly established that widely-accepted "law of war" principles determined who was subject to "trial by military tribunal" under the applicable statutory framework. *See id.* at 30 (noting that "Congress has incorporated by reference, as within the jurisdiction

of military commissions, all offenses which are defined as such by the law of war"); *see also Hamdi*, 542 U.S. at 518 (citing *Quirin* to conclude that, "by universal agreement and practice," the "capture, detention, and trial of unlawful combatants" is an "important incident of war" (internal quotation marks, brackets and citation omitted)). Persons who, like the *Quirin* defendants, had conceded their formal affiliation with enemy armed forces and "with the purpose of destroying war materials and utilities, [had] entered or after entry [had] remained in our territory without uniform," unquestionably committed "an offense against the law of war." *Quirin,* 317 U.S. at 46; *see also Hamdi*, 542 U.S. at 571 (Scalia, J., dissenting). Thus, the *Quirin* Court concluded that their trial by military tribunal was authorized by statute. *Quirin,* 317 U.S. at 46.

Notably, although this Court unconditionally determined that the defendants in *Quirin* qualified as "enemy belligerents" subject to trial by military tribunal under longstanding law-of-war principles, *id.* at 37, it did not address the unclear international law status of individuals who have no formal affiliation with the military arm of an enemy government. *Compare* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2113-2116 (2005) (suggesting that "enemy combatant" status under the AUMF depends largely on the scope of one's association with an enemy terrorist organization) *with* Ryan Goodman & Derek Jinks,

International Law, U.S. War Powers, and the Global War on Terrorism, 118 Harv. L. Rev. 2653, 2654-2658 (2005) (arguing that direct participation in hostilities is a necessary and important ingredient to the "enemy combatant" classification).

4. Congress's contemporaneous creation of a detailed scheme in the Patriot Act for detention of domestic terrorism suspects that does not authorize military detention without charge or trial contradicts the Executive's interpretation of the AUMF

Congress's enactment of the Patriot Act, *see* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA Patriot Act") Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, demonstrates that any Executive military detention authority that can be inferred from the language of the AUMF (as in *Hamdi*) was not intended to apply in the domestic sphere. Congress intended the AUMF to provide the President with authority to conduct military operations abroad in response to the September 11th attacks. In contrast, the Patriot Act was intended to address the scope of the Executive's powers with regard to combating terrorism at home.

a. The Patriot Act was enacted five weeks after the AUMF was signed into law. *See* Patriot Act, 115 Stat. at 272. Various elements of the legislation that became the Patriot Act were being considered by

members of Congress, in conjunction with the Executive branch, at the same time that the AUMF was enacted. *See Hearing on Terrorism Investigation and Prosecution Before the S. Comm. on the Judiciary*, 107th Cong. 1 (Sept. 25, 2001) [hereinafter "*Hearing on Terrorism Investigation and Prosecution*"] (statement of Sen. Leahy) (remarking that the Attorney General had started briefing and working with a bi-partisan group of congressional leaders regarding domestic anti-terrorism legislation "literally within hours of the terrible matters on September 11"). As enacted, the Patriot Act was designated as an Act to provide the Executive with "tools" to "[i]ntercept and [o]bstruct [t]errorism," § 1(a), 115 Stat. at 272.

Military detention of persons in the United States without charge or trial for the duration of international hostilities is not one of the "tools" that the Patriot Act provides. First, the Patriot Act does not authorize the Executive to use *military* authority in the domestic sphere at all.

Second, Congress placed a specific, temporal limit on the authority that the Patriot Act confers on the Attorney General to use civilian authority to "take into custody any alien" in the United States who is certified as a national security threat by the Attorney General based on "reasonable grounds to believe" that such person has engaged in or is associated with terrorist activities or "any other activity that endangers the national security of the United States." 8 U.S.C. § 1226a(a)(1), (3)(A), (3)(B).

Congress specified that the Attorney General must, within seven days of arrest, either place the alien in removal proceedings or charge the alien with a criminal offense. *Id.* § 1226a(a)(5). By contrast, the domestic military detention without charge at issue here has already lasted for more than five years.[5]

Third, even when an alien has been certified by the Attorney General to be a national security danger and has been placed in removal proceedings or ordered removed, if that alien is unlikely to be removed in the reasonably foreseeable future, the Patriot Act limits the Attorney General's detention authority to "additional periods of up to six months" and "only if the release of the alien will threaten the national security of the United States or the safety of the community or any person." 8 U.S.C. § 1226a(a)(6). The Act requires that the Attorney General review the national security threat certification every six months, and if the Attorney General determines the certification should be revoked, the alien may be released on appropriate conditions, "unless such release is otherwise prohibited by law." 8 U.S.C. § 1226a(a)(7). The Act also allows the detained alien

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[5] Even for detention of persons who are under a final order of removal, immigration law designates a specified period of time within which such alien must be removed, and where removal cannot be accomplished within the specified timeframe, this Court has both refused to read immigration statutes to authorize the indefinite detention of such persons and required periodic reassessment of the reasonableness of such detention. *See Zadvydas v. Davis*, 533 U.S. 678, 682 (2001).

to request in writing every six months that the Attorney General reconsider the certification of him as a national security threat and to submit documents or other evidence in support of that request, *ibid.* In addition, the Patriot Act provides such detained aliens with access to *habeas corpus* relief and appellate review. *Id.* § 1226a(b). In enacting the Patriot Act, Congress thus granted the Executive domestic detention powers over persons suspected of terrorism who are determined to be national security threats and those powers are much more circumscribed than the power the government now claims.[6]

Well-settled canons of statutory construction preclude a general grant of authority from rendering a specific one superfluous. *See Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973) (where "Congress has passed a more specific act to cover [a particular] situation," it should govern such situations in lieu of an available general statute, which could otherwise apply); *see also St. Louis, I. M. & S. Ry. Co. v. United States*, 251 U.S. 198, 207 (1920) ("Congress must be presumed to have known of its former legislation * * * and to have passed the new laws in view of the provisions of the legislation already enacted."); *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639*, 362 U.S. 274, 291-292 (1960) ("Courts may properly take into account the later Act when asked to extend

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[6] *Amici* take no position here on the constitutional validity of the Patriot Act or the procedures that it authorizes.

the reach of the earlier Act's vague language to the limits which, read literally, the words might permit.").

Thus, the broad provisions of the AUMF cannot be read to render superfluous the Patriot Act's specific provisions demarcating the scope of the Executive's power to detain persons who pose national security threats in the United States. If Congress had intended the AUMF to be read so broadly, the detention provisions of the Patriot Act would have been unnecessary. This Court should not adopt such a construction. *See Hohn v. United States*, 524 U.S. 236, 249 (1998) ("We are reluctant to adopt a construction making another statutory provision superfluous.").

b. The legislative history of the Patriot Act confirms this conclusion. Congress considered, and *rejected*, a provision that would have granted the broad authority that the Executive claims here—*i.e.*, potentially unlimited detention without charge or trial of any person that the Attorney General "has reason to believe may further or facilitate" terrorist acts. *See Hearing on Terrorism Investigation and Prosecution*, *supra*, at 26 (statement of Sen. Arlen Specter) (expressing concerns that the legislation proposed by the Executive branch "gives broader powers than just having mandatory detention of someone thought to be a terrorist who is being held for deportation on some other lines"); *see also* John Lancaster, *Hill Puts Brakes On Expanding Police Powers*, WASHINGTON POST, Sept. 30, 2001, at A6

(noting that "the administration's anti-terrorism package has run into strong bipartisan resistance," including an unwillingness to pass legislation pursuant to which a person "suspected of involvement in terrorism—but not convicted of a crime—could be held indefinitely at the discretion of the attorney general or other Justice Department officials").

Moreover, the fact that Congress found it necessary to establish domestic detention powers in the Patriot Act strongly suggests that such power was not part of the AUMF. Senator Orrin Hatch explained that the Patriot Act bill "represent[s] the *domestic* complement to the weapons our military currently is bringing to bear on the terrorists' associates overseas" pursuant to the authority that Congress previously had granted in the AUMF. 147 Cong. Rec. S10990, S11015 (daily ed. Oct. 25, 2005) (statement of Sen. Hatch) (emphasis added). Likewise, in contrast to the government's argument here that the AUMF provides the Executive with domestic detention authority, even after the AUMF was enacted, top Justice Department officials actively sought the legal authority to detain without charge or trial alien terrorism suspects who were arrested while lawfully in the United States and who the Attorney General believed posed a national security threat. *See Hearing on Legislative Proposals Designed to Combat Terrorism Before the H. Comm. on the Judiciary*, 107th Cong., 2001 WL 1143717

(Sept. 24, 2001) (testimony of Assistant Att'y Gen. Viet Dinh).

B. Article II Of The Constitution Does Not Grant The Executive Inherent Authority To Use The Military To Detain Without Charge Or Trial Persons Who Are Lawfully In The United States

The government wrongly argued below that it can find authority in Article II of the Constitution to use the military to detain without charge or trial terrorism suspects who are lawfully in the United States.

This Court should subject that claim to careful scrutiny because, as explained above, such authority is contrary to the will of Congress with regard to the Executive's treatment of domestic terrorism suspects as established in the Patriot Act. Congress's enactment of the Patriot Act, and its failure to authorize domestic military detention by the Executive of persons who are lawfully in the United States, strongly counsels against any conclusion that the Constitution inherently permits the Executive to impose such domestic military detention. As Justice Jackson explained in his concurrence in *Youngstown*, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb" and any claim to such power "must be scrutinized with caution, for what is

at stake is the equilibrium established by our constitutional system." 343 U.S. at 634.

1. The Commander-in-Chief Clause of Article II does not provide the President with inherent authority to use the military to detain persons who are lawfully in the United States

a. The President's primary role as Commander-in-Chief is to direct the conduct of American troops engaged in armed conflicts on the battlefield. *See Ex parte Milligan*, 71 U.S. at 139 (the Commander-in-Chief power consists of "the command of the [armed] forces and the conduct of [military] campaigns").

The Constitution looks both to Congress and the President when it addresses war powers and the Nation's security forces. Many of the critical wartime decision-making functions are reserved in the Constitution for Congress. *See Quirin*, 317 U.S. at 26 (the Constitution "invests the President as Commander in Chief with the power to wage war *which Congress has declared*, and to carry into effect all *laws passed by Congress* for the conduct of war and for the government and regulation of the Armed Forces" (emphasis added)). Indeed, "out of seventeen specific paragraphs of congressional power" that are set forth in Article I of the Constitution with regard to the powers of Congress, "*eight* of them are devoted in whole or in part to specification of powers

connected with warfare." *Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950) (emphasis added) (naming Congress's enumerated power to provide for the common defense, to declare war, to raise and support armies, to provide and maintain a navy, to make rules for the government and regulation of the land and naval, and to make rules concerning captures on land and water).

The government's contention that the Constitution authorizes the Executive to use the military domestically, without congressional authorization, in order to detain persons who are lawfully in the United States cannot be reconciled with the Framers' concerns. "The Commander-in-Chief Clause was understood [by the Framers] to establish the hierarchical superiority of the President in the military chain of command, thereby both ensuring civilian control over the armed forces and establishing a 'superintendence prerogative' with respect to at least some military operations," but *not* to give the Executive the power to proceed without congressional authorization in regard to matters of war. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 Harv. L. Rev. 689 (2008). The Framers were wary of standing armies "constantly on foot" and of "the danger of an undue exercise of military power" by the Executive, especially within the domestic sphere. 3 Joseph Story, *Commentaries on the Constitution of the United States* 94, 97 (Boston, Hilliar, Gray & Co.

1833); *accord Hamdi*, 542 U.S. at 568 (Scalia, J., dissenting) ("No fewer than 10 issues of the Federalist were devoted in whole or in part to allaying fears of oppression from the proposed Constitution's authorization of standing armies in peacetime.").

b. This Court has never held that, in the absence of express congressional authorization, the President has inherent authority under the Constitution to use military power inside the United States. *See Youngstown*, 343 U.S. at 632 (Douglas, J., concurring) ("[O]ur history and tradition rebel at the thought that the grant of military power [to the Commander-in-Chief] carries with it authority over civilian affairs."). Except when force is used for a limited range of defensive purposes, *see infra* Part B(1)(c), the President must seek advance authorization from Congress to initiate the use of military power inside the United States.

Indeed, as this Court reasoned in *Brown*, 12 U.S. at 126-127, the fact that Congress saw fit to enact the Alien Enemy Act, ch. 66, 1 Stat. 577 (1798), which, in the midst of an undeclared naval war with France, expressly granted the President authority to impose domestic military detention on certain lawful residents in the unusual circumstances of a declared war or invasion by a foreign nation or government, strongly suggests that the Executive has no inherent constitutional power to impose the detention that the Act was enacted to authorize. Similarly, this Court squarely rejected the Executive's imposition of

military justice over a citizen who was apprehended in a peaceful State, even though it was alleged that he had conspired with and joined a secret enemy organization "for the purpose of overthrowing the Government." *Ex parte Milligan*, 71 U.S. at 6. Despite this serious allegation of a national security threat, this Court maintained that the Executive had no inherent authority under the Constitution to try such a person in a military, rather than civilian, court. *See id.* at 121, 124.

It is of particular importance that the Executive here claims the constitutional prerogative to use military detention power *inside the United States.* This Court need not determine whether, or to what extent, the Commander-in-Chief Clause of Article II authorizes the Executive to engage in military detention without charge or trial of persons captured on foreign soil in the absence of congressional authorization. *See Hamdi*, 542 U.S. at 577 (Scalia, J., dissenting) ("Where the citizen is captured outside and held outside the United States, the constitutional requirements may be different."). Regardless of any constitutional authority that the Executive may have to act without congressional authorization with regard to military affairs in foreign territory, *see United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-316 (1936), "the Constitution's policy that Congress, not the Executive, should control utilization of the war power *as an instrument of domestic policy*," *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring) (emphasis added), is well established and should not be in dispute.

c. Even the widely accepted historical power of the President to use the military to repel a sudden attack on, or invasion of, our country, *see The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863), does not encompass the power to use the military to detain persons who are lawfully in the United States and well outside the territorial and temporal scope of the attack. Such power to use the military to detain individuals who are lawfully in the United States as a means of thwarting an invasion is not at issue in the instant case, of course, because any such authority would exist only in a moment of genuine emergency, when there was no time for deliberation. *See Hamdi*, 542 U.S. at 552 (Souter, J., concurring). Such an emergency has not been alleged by the government here. Moreover, the expedience and attention with which Congress acted in regard to the September 11th attacks demonstrates that, even in a moment of true exigency, there likely would be no "want of statutory authority" that would impede Executive action in preventing further attack. *Ibid.*[7]

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[7] Whether the established power of the Executive to repel a sudden attack or an invasion is an inherent power under Article II or stems from congressional authorization is an open question. *See, e.g., The Prize Cases*, 67 U.S. at 670 (noting that if President Lincoln's power to quell the insurrection required congressional authorization, such was to be found "in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency"); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827) (opining that the President's authority to decide whether an exigency calling

(Continued on following page)

Setting aside the circumstance in which there is evidence of an imminent attack against the United States—and here none has been alleged—the power to use the military to detain without charge or trial persons who are lawfully in the United States cannot be grounded on the contention that such domestic detention authority is required to combat terrorism during a time of war. Armed international conflict always and inevitably presents unforeseen dangers to the security of the Nation. During such urgent times, when fear and uncertainty give rise to fervent calls for protection at the expense of individual liberty, it is all the more important that the breadth of Executive power be kept in check, consistent with the Nation's constitutional framework.

2. In the absence of congressional authorization, the Executive cannot subject a person who is lawfully in the United States to military detention in lieu of civilian criminal prosecution without encroaching on the powers of other branches of government

Any claim of inherent constitutional executive power to use the military to detain without charge or

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for force has arisen "necessarily results from the nature of the power" that Congress had granted the Executive in passing the Militia Act). The Court need not determine the source of any such power here.

trial persons who are lawfully in the United States would contravene separation of powers principles by encroaching on authority that the Framers reserved for other branches of government.

First, as discussed above, the use of military power is a shared responsibility between the Legislature and the Executive under our Constitution. *Cf. Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) ("Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."). Like seizure of the steel mills in *Youngstown*, the circumstances under which individuals who are inside the United States may be deprived of liberty by military detention is a matter that is constitutionally relegated to the determination of Congress, not the will of the Executive through the unauthorized imposition of military force. *See Youngstown*, 343 U.S. at 587 (acknowledging that "[e]ven though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property [in this United States] in order to keep labor disputes from stopping production" because "[t]his is a job for the Nation's lawmakers, not for its military authorities"); *id.* at 644 (Jackson, J., concurring) ("That the military powers of the Commander-in-Chief were not to supersede representative government of internal affairs seems

obvious from the Constitution and from elementary American history"). Neither the Executive nor this Court is free to redistribute that power to make laws.

Second, although it is a fundamental constitutional tenet that civilian courts adjudicate government allegations against individuals in the United States that may result in a deprivation of liberty, the Executive contends here that it has the power to bypass the constitutional role of the courts as guarantors of a fair pre-deprivation process and use the military to detain without charge or trial persons whom it has apprehended in the United States. Within our constitutional framework, however, courts serve as a bulwark against the suppression of the procedural constitutional rights of individuals within the domestic sphere. Consequently, this Court has consistently maintained that the civilian judicial system—and the rights that it protects—cannot be supplanted by Executive military action without congressional authorization, so long as the courts are open and functioning. *See Duncan*, 327 U.S. at 315-316, 324; *Ex parte Milligan*, 71 U.S. at 122. This Court should reach that same conclusion here.

C. A Ruling That The Executive Has The Power To Use The Military To Detain Without Charge Or Trial Persons Who Are Lawfully In The United States Would Undermine Our Civilian Criminal Justice System And Important Rights Of Citizens

1. The military detention authority that the Executive claims in this case would permit manipulation of the civilian criminal justice system

If military detention without charge or trial of persons who are lawfully in the United States were a legal option for the Executive, the foundations of our *civilian* criminal justice system would be subject to erosion. The government would have little incentive to pursue more costly and time-consuming civilian criminal prosecutions, with the numerous attendant protections for individual constitutional rights that such proceedings provide. Military detention could become the *norm*, not the rare exception, in cases involving domestic terrorism allegations.

Recognition of military detention authority in the domestic realm also would permit government manipulation of civilian criminal proceedings. The government's handling of the allegations against Jose Padilla reflects such a likelihood because the government shuttled the terror suspect between military detention and civilian criminal prosecution at will. *See Padilla v. Hanft*, 432 F.3d 582, 583-584 (4th Cir. 2005); *see also Padilla v. Hanft*, 547 U.S. 1062, 1063 (2006) (Kennedy, J., concurring in the

denial of *certiorari*) (noting that, while Padilla had been transferred from military detention into the civilian justice system, there was "a continuing concern that his status might be altered again"). Such power would allow the Executive to wield the threat of military detention over individuals subject to domestic criminal prosecution, and also permit the collection of information for use in civilian criminal prosecutions while operating outside the confines of civilian criminal procedure rules. *See, e.g., United States v. Abu Ali*, 528 F.3d 210, 229-34 (4th Cir. 2008) (upholding the inclusion at trial of incriminating statements made by the defendant, a United States citizen, during his 20 months of detention in Saudi Arabia, despite allegations of torture).

The incentives for such manipulation are compounded if former detainees ultimately have little legal recourse against the government officials responsible for any mistaken and unlawful detention. *See, e.g., Arar v. Ashcroft*, 532 F.3d 157, 189-190 (2d Cir. 2008) (denying a domestic detainee's *Bivens* remedy because he could not show that the government, in detaining him in order to interrogate him about his connections with terrorist groups, acted with "punitive intent" or an illegitimate purpose), *reh'g en banc granted* (2d Cir. Aug. 12, 2008) (oral argument held Dec. 9, 2008); Pet. Br. at 18-19, *Ashcroft v. Iqbal*, No. 07-1015 (U.S. Aug. 29, 2008) (arguing that a heightened qualified immunity standard should apply to foreclose all claims brought

by terrorism suspect detainees against top-tier Executive Branch officials).

2. The power claimed here by the Executive would imperil citizens and non-citizens alike

The threat to individual liberty that arises from the claimed breadth of the Executive's detention authority in this case affects more than just a small and isolated segment of the population of the United States; it extends to all persons who are lawfully in this country, including citizens.

Currently, the Non-Detention Act, 18 U.S.C. § 4001(a), prohibits the detention of citizens without congressional authorization, but this law would not shield citizens if the AUMF is construed as implicit congressional authorization for the President to use the military to detain without charge or trial persons who are lawfully in the United States. *See Hamdi*, 542 U.S. at 517. The AUMF makes no distinction between citizens and noncitizens. Nor would the American citizenship of a suspected terrorist render him any less of an "enemy combatant," or restrict his detention as such. *Id.* at 519 ("There is no bar to this Nation's holding one of its own citizens as an enemy combatant.").

Thus, not only lawfully present noncitizens but also United States citizens—both of whom the Constitution protects against the deprivation of liberty without due process, *see Zadvydas v. Davis*,

533 U.S. 678, 693 (2001); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896)—could be swept up in domestic military detention dragnets. And the severe price to be paid for mistaken allegations of terrorist ties would be borne by innocent citizens and non-citizens alike. *Cf.* Mark Larabee & Ashbel S. Green, *One Mistaken Clue Sets a Spy Saga in Motion*, THE OREGONIAN, Mar. 26, 2006, at A1 (describing the two-week long detention of a Portland-area lawyer on a material witness warrant that was issued based on the government's erroneous allegation of a connection between his fingerprint and the 2003 Madrid bombings).

The Executive here has not disclaimed the power to use the military to apprehend and detain, without charge or trial, United States citizens who are in the United States. To the contrary, the government is on record arguing that the President can do precisely that. *See* Pet. Br. at 40, 41, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027) (arguing that "nothing in the Authorization of Force suggests that Congress sought to withhold support for the President's use of force against enemy combatants who are American citizens," and that "[t]here is also no basis for reading the broad language of [the AUMF] to contain an unstated exception for enemy combatants captured within the United States"); *id.* at 44 ("[T]here is no question that the President's decision to detain Padilla[, a U.S. citizen apprehended in the United States,] as an enemy

combatant falls comfortably within the broad sweep of Congress's Authorization of Force.").

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,
Petitioner,

v.

COMMANDER DANIEL SPAGONE,
U.S.N., CONSOLIDATED NAVAL BRIG,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* CIVIL WAR HISTORIANS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICI CURIAE*

Amici Curiae are scholars who have studied and taught the history of the United States, our government, and our legal institutions in the Civil War era. Those studies persuade us that the questions presented here bear a striking resemblance to those decided over a century ago in *Ex parte Milligan*, 71 U.S. (4 Wall) 2 (1866), which held that legal residents of this country who planned terrorist activity could not be denied a jury trial in civilian courts so long as those courts were open. The historical context of the *Milligan* decision underscores its significance for this case.

SUMMARY OF ARGUMENT

Al Qaeda is not the first terrorist organization to threaten the United States, nor is Petitioner Al-Marri the first lawful U.S. resident to be arrested and held in military custody as an alleged member of such an organization. In October of 1864, in the midst of the Civil War, military authorities arrested Lambdin Milligan at his home in Huntington, Indiana. Within two months, a military tribunal convicted Milligan, along with several others, of belonging to a "secret military organization" that engaged in and was planning acts of belligerency

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* All parties consent to the filing of this *Amicus Curiae* brief. Pursuant to Rule 37.6, the *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

against the United States.[1] Milligan sued in federal court to challenge the legality of his military detention. In December 1866, this Court unanimously rejected the Government's claim that the army could detain and try Milligan and his co-petitioners.

The parallels between *Milligan* and this case include both the illegal conduct charged and the statutory framework that applied to each case. Moreover, just as Al-Marri's petition has attracted support from accomplished advocates and distinguished *amici curiae* from the legal, military, and academic worlds, Milligan received critical aid from unlikely allies. Indeed, some who were instrumental to Lambdin Milligan's triumph were also vigorous proponents of an aggressive war policy. Then, as now, insistence on the rule of law was entirely consistent with a stern commitment to national security.

ARGUMENT

I. Factual And Legal Parallels Between *Ex Parte Milligan* And This Case

The autumn of 1864 was a tense time in Indiana. Many in the state had emigrated from Kentucky, Virginia, Tennessee, and the Carolinas, and were "Southern in kinship, sympathies, and

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[1] *See* Brief for United States at 2, *Ex parte Milligan*, 71 U.S. 2 (1866).

political ideas."[2] The state's largely agrarian economy depended heavily on the Mississippi River to transport its goods to market. Like neighboring Ohio and Illinois, Indiana was home to a large number of Confederate sympathizers known as "Copperheads" or "Butternuts."[3] In 1862, Democrats running on a peace platform controlled the state legislature.[4] Local Democratic parties adopted "peace resolutions,"[5] while some Democratic politicians openly discussed establishing a "Northwest Confederacy" that would span Indiana, Ohio, Illinois, Missouri, and Kentucky.[6] More troubling to Union officials, secretive Copperhead groups might come to the aid of Confederate forces in the event of a military invasion by the South. To

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[2] James A. Woodburn, *Party Politics in Indiana During the Civil War*, *in* Annual Report of the American Historical Association for the Year 1902, Vol. I at 226 (1903) (hereafter "Woodburn") (calling Indiana the most "pro-slavery" of the Northern states).

[3] *See generally* Jennifer L. Weber, Copperheads: The Rise and Fall of Lincoln's Opponents in the North (2006) (hereafter "Weber"); Frank L. Klement, Copperheads in the Middle West (1960); Wood Gray, The Hidden Civil War: The Story of the Copperheads (1942).

[4] Woodburn at 251.

[5] James M. McPherson, Battle Cry of Freedom 762 (1988) (hereafter "McPherson").

[6] Woodburn at 239. *See generally* Benn Pitman, The Trials for Treason at Indianapolis: Disclosing the Plans for Establishing a North-Western Confederacy, Official Record of the Trials before the Military Commission convened by Special Order No. 129, Headquarters District of Indiana (1865) (hereinafter "O.R.").

secure the state, the Lincoln Administration organized it as a military district in March of 1863.

In July 1863, Confederate cavalry commanded by John Morgan stampeded across southern Indiana and into Ohio, looting towns and spreading terror.[7] By the following summer, Morgan's cavalry was raiding towns in neighboring Kentucky, threatening more raids into Indiana.[8] In this climate of fear, the commander of the District of Indiana, General Henry B. Carrington, launched the investigation that led to the arrest of Lambdin Milligan and several others.

A. The Sons Of Liberty Posed Threats To The Nation Comparable To Those Posed By Al-Qaeda

1. The Case Against Lambdin Milligan

General Carrington feared that if Confederate forces invaded Indiana, Copperhead groups would lead thousands of Indianans into their ranks or would assist the Confederates through sabotage and espionage.[9] He quickly focused on the Order of the Sons of Liberty, a secret society divided into "temples" or "lodges" that employed secret passwords

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[7] *See* Edison H. Thomas, John Hunt Morgan and His Raiders 77-82 (1985).

[8] *Id.* at 95-97.

[9] *See* Official Report of the Judge Advocate General on the Sons of Liberty (Oct. 8, 1864), *reprinted in* O.R. at 323-339 (hereafter "JAG Report").

and elaborate rituals.[10] In Missouri, the Order had joined Confederate guerillas to cause significant damage and tie up tens of thousands of Union forces who were desperately needed elsewhere.[11] Historical estimates put the group's Indiana membership at around 18,000 in 1864.[12] In his report to the Secretary of War, the Judge Advocate General for the tribunal that tried Milligan estimated that the Order numbered 500,000 nationwide, with as many as 75,000 in Indiana alone.[13] Lambdin Milligan was one of four "Major Generals" in the Indiana chapter.[14]

Employing a network of spies, General Carrington unearthed a dangerous plot. Leaders of the Sons of Liberty had met with Confederate agents in Canada to plan operations in the Northwestern states.[15] They proposed that Confederate soldiers from Canada join Sons of Liberty in Chicago during the 1864 Democratic National Convention and

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[10] *See* William Dudley Foulke, Life of Oliver P. Morton 387-90 (1899) (hereafter "Foulke"); *see also* JAG Report, O.R. at 323-26. The group went by a number of names, including the Knights of the Golden Circle and the Order of American Knights, but by the time of Milligan's arrest in 1864, they called themselves the Sons of Liberty. *Id.* at 323-24.

[11] McPherson at 274.

[12] Weber at 148.

[13] JAG Report, O.R. at 326.

[14] Testimony of Felix Stidger, O.R. at 112, 118; Testimony of Horace Heffren, O.R. at 125.

[15] *See* McPherson at 216

attack Camp Douglas, which held over 5000 Confederate prisoners. Together with the freed prisoners, they could then seize the nearby federal arsenal and march to Kentucky and Missouri to join Confederate forces.[16] Simultaneously, other Sons of Liberty chapters were to attack Union prison camps in Indiana and Ohio, releasing Confederate prisoners and seizing arsenals before moving South. This scheme foundered for several reasons, including shifts in the date of the Democratic Convention, the intercession of federal authorities, and an apparent lack of will on the part of some within the Order.[17]

Historians debate whether the plan had a realistic prospect of success,[18] but the leaders of the Sons of Liberty, the Confederacy, and the Union forces took it seriously at the time. The Confederate government distributed at least a half a million dollars to the Order's leaders to finance the operation.[19] An Indiana publisher named Harrison H. Dodd – the "Grand Commander" of the Indiana Sons of Liberty – received at least $100,000 to buy weapons and plan an attack on Camp Morton in

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[16] Weber at 149-51, 166; Foulke at 413.

[17] Weber at 149, 166; Foulke at 413-14.

[18] The same might be said about the government's allegations against Al-Marri as set forth in the Rapp Declaration, particularly the supposed plan to "hack into the main-frame computers of banks with the objective of wreaking havoc on U.S. banking records and thus damaging the country's economy." Pet App. 472a.

[19] Foulke at 401-02; Weber at 166. This would be equivalent to more than $10 million in current dollars.

Indiana.[20] Acting on an informant's tip, General Carrington ordered a raid on Dodd's print shop on August 20, 1864.[21] Soldiers found a large cache of recently purchased firearms and ammunition, a Sons of Liberty seal, a membership list, and incriminating correspondence with prominent figures in the state, including Lambdin Milligan.[22] Armed with this evidence and reports from various informants, military authorities arrested Dodd and speedily convened a military tribunal to try him in Indianapolis on September 17, 1864. While the Dodd hearing proceeded before a commission of eight army officers, troops arrested five more leaders of the Indiana Sons of Liberty, including Milligan.[23] Two days later, Dodd escaped from custody and fled to Canada. The remaining five were tried together by the same military commission – augmented by four additional officers – that had been convened to decide Dodd's case.[24]

The defendants faced five charges: (1) conspiracy against the Government of the United States, (2) affording aid and comfort to rebels, (3) inciting insurrection, (4) disloyal practices, and (5)

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[20] O.R. at 112; Weber at 120, 149, 166.

[21] O.R. at 119; Foulke at 489.

[22] Foulke at 489; O.R. at 88, 119.

[23] O.R. at 10. The four others were William Bowles, Horace Heffren, Andrew Humphreys and Stephen Horsey.

[24] Foulke at 419-420, 424. Dodd escaped on October 7, 1864. *Id.*; *see also* O.R. at 50.

violating the Laws of War.[25] Each charge included "specifications," such as the following:

> *Charge First, Specification Fourth:*
>
> [That they] did conspire and agree to seize by force the United States and State Arsenals at Indianapolis, Indiana, Columbus, Ohio, and Springfield, Illinois, to release by force the rebel prisoners held . . . at Camp Douglas, Illinois, Camp Morton, Indiana, and Camp Chase, Ohio, and the Depot of Prisoners of War on Johnson's Island; and arm those prisoners with the arms seized, and . . . with all the forces they were able to raise in the secret order above-named, were, in conjunction with the rebel prisoners thus released and armed, to march into Kentucky and Missouri, and co-operate with the rebel forces to be sent . . . against the Government and authorities of the United States.
>
> *Charge Second, Specification First:*
>
> [That they] did design and plot to communicate with the enemies of the United States, and did communicate with the enemies of the United States, with the intent that they should, in large force, invade the territory of the United States . . . with the further intent, that the so-called secret, unlawful society, or order, aforesaid, should then and there co-

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[25] O.R. at 73-77.

> operate with the said armed forces of the said rebellion against the authority of the United States.
>
> *Charge Fifth, Specification First:*
>
> [That they] did, while the Government of the United States was carrying on a war . . .[and] while pretending to be peaceable loyal citizens of the United States, . . . attempt to introduce said enemies of the United States in to the loyal States . . . [to] destroy the authority of the United States.[26]

During the nearly six week trial, evidence showed that the Sons of Liberty divided the state into four military districts, with Lambdin Milligan the "Major General" of the Northeastern district.[27] As part of the Order's "military affairs committee," Milligan was to assemble a military organizational plan.[28] An informant, Felix Stidger, described Dodd's plot to attack Camp Morton, adding that that the group was experimenting with "Greek fire," a flammable liquid that could be placed in grenade-like devices to start fires that were difficult to extinguish. When connected to a "clock machine," the devices could be "put into a box or trunk, and without exciting any suspicion, be left on board a

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[26] O.R. at 74-77.

[27] Testimony of Felix Stidger, O.R. at 112, 118; Testimony of Horace Heffren, O.R. at 125.

[28] Testimony of Felix Stidger, O.R. at 111, 117.

steamer, or in a building, which would be set on fire at any time at which the clock might be set."[29] Stidger testified that the devices had been used to destroy two Union boats in Kentucky and that the group intended to use them against other Union targets.[30]

Milligan's military trial began in Indianapolis within three weeks of his arrest. He enjoyed unfettered access to counsel throughout his detention. The trial was open to the public, with transcripts published daily in the local paper.[31] In addition to raising jurisdictional objections to the proceeding, defense counsel conducted lengthy cross-examinations of government witnesses and called rebuttal and character witnesses of their own. (By contrast, Al-Marri was transferred into military custody on the eve of a suppression hearing and less than a month before trial in his criminal case – after already spending eighteen months in jail – and was held incommunicado for the next sixteen months. Since being placed in military custody in 2003, Al Marri has been held in solitary confinement and has not been afforded even a military hearing. The only evidence publicly presented against him is a partially redacted, hearsay declaration that was released over the Government's objection.)

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[29] *Id.* at 108, 118.

[30] *Id.* According to Stidger, Jefferson Davis had promised to pay the Order "ten per cent for all the property destroyed, taking the estimate, as given in the Northern papers."

[31] *See Indianapolis Daily Journal*, Oct. 22, 1864-Dec. 1, 1864.

The military tribunal in 1864 convicted all of the defendants and sentenced all but one to death by hanging.[32] Claiming the right to be tried by a jury in civilian courts, Milligan and two others petitioned for habeas relief from the Circuit Court in Indianapolis, which referred the case to the Supreme Court. This Court ruled in the petitioners' favor on April 3, 1866. In December of 1866, the Court released two opinions: a majority opinion endorsed by five justices and a concurring opinion for the other four.

Writing for the Court, Justice David Davis did not question the gravity of the charges against Milligan, noting that he was accused of "seek[ing] by stealthy means to introduce the enemies of the country into peaceful communities, there to light the torch of civil war, and thus overthrow the power of the United States." 71 U.S. at 130. Davis conceded that "[c]onspiracies like these, at such a juncture, are extremely perilous; and those concerned in them are dangerous enemies to their country, and should receive the heaviest penalties of the law." *Id.* He explained that if Milligan's "guilt had been ascertained by an established court and impartial jury, he deserved severe punishment." *Id.* But because the courts were open and functioning in

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[32] One defendant, Horace Heffren, turned state's evidence halfway through the trial in exchange for having the charges against him dropped. Foulke at 425. Another was sentenced to hard labor but was released in January of 1865. Only Milligan, William Bowles, and Stephen Horsey petitioned in federal court for habeas relief. *Id.* at 427.

Indiana in 1864, the Court held that he could not be detained or tried by the military. Davis wrote that this conclusion was mandated both by the Habeas Corpus Act of 1863, and by the guarantee of a criminal jury trial in the Constitution. *Id.* at 122 (if Milligan had been tried in a civil court, "the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended").[33] Davis warned that only "[b]y the protection of the law, human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people." *Id.* at 119.

The concurring justices agreed that Congress had not provided for the military detention and trial of Milligan and his co-petitioners, but believed that "when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals." *Id.* at 140 (Chase, C.J., concurring).

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[33] That Milligan was a U.S. citizen – not a legal resident like Al-Marri – provides no basis for distinguishing the Court's holding from this case. The Court relied on the due process rights afforded defendants under the Fifth and Sixth Amendments, which apply with equal force to lawful resident aliens like al-Marri. *See, e.g., Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350 (2006)

2. *The Factual Parallels Between The Two Cases Reinforce The Application Of* Ex Parte Milligan *Here*

Although scholars disagree over the sufficiency of the trial evidence, the *Milligan* petitioners plainly were charged with activities as threatening to the nation's security as anything alleged against Al-Marri: violent insurrection, plans to attack federal facilities, and assistance to foreign belligerents. That some still debate Milligan's guilt is due in no small part to the irregular nature of the process by which he was tried. Had the Milligan petitioners received a full jury trial, as this Court held they should have been, history's verdict would likely be clearer.[34]

Ascertaining the truth of the Government's allegations against Al-Marri is no easier despite his many years in prison. The only public evidence of Al-Marri's alleged activities appears in the hearsay declaration of intelligence official Jeffrey N. Rapp, which asserts that Al-Marri is a "sleeper agent" of al

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[34] Despite questions about the sufficiency of the evidence against Milligan, the case against William Bowles – whose habeas petition was also granted by this Court – was considerably stronger. In a 1996 speech, then Chief Justice William Rehnquist opined that the evidence against Bowles "would very likely have been sufficient to convict him in a civil court." *See* William Rehnquist, *Civil Liberty and the Civil War: the Indianapolis Treason Trials*, 72 Ind. L.J. 927, 933-34 (1997) (hereafter "Rehnquist") (reprinting remarks delivered on October 28, 1996 to the Indiana School of Law).

Qaeda.[35] After training with al Qaeda, according to Rapp, Al-Marri was instructed to act as a "point of contact for al Qaeda operatives arriving in the United States" and "to explore possibilities for hacking into the main-frame computers of banks with the objective of wreaking havoc on U.S. banking records."[36] The Declaration also states that Al-Marri had suspicious and possibly incriminating material on his laptop computer.[37]

But for advances in technology, Al-Marri's alleged activities are little different from those charged against Milligan and his co-defendants. Both were accused of being members of secretive groups that were organized in a paramilitary structure to engage in violent acts against the United States. Al-Marri is accused of being a "sleeper agent," while Milligan and his co-petitioners supposedly "pretend[ed] to be peaceable, loyal citizens" while seeking to "introduce said enemies of the United States into the loyal States."[38] Al-Marri allegedly plotted cyber attacks and researched dangerous chemicals, while Milligan and his co-petitioners were accused of planning armed attacks and experimenting with Greek fire.

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[35] Declaration of Mr. Jeffrey N. Rapp, Director, Joint Intelligence Task Force for Combating Terrorism (Sept. 9. 2004) (declassified version), Pet. App. at 468a, 472a, 483a.

[36] *Id.* at 474a.

[37] *Id.* at 475a-476a.

[38] O.R. at 77.

There is no historical basis for the government's attempt to argue that Lambdin Milligan, unlike Al-Marri, "did not associate himself with the enemy forces."[39] After the attacks of September 11, 2001, Congress authorized the president to use force against "those nations, organizations or persons" responsible, which included both the Taliban government and al Qaeda; during the Civil War, Congress authorized the president to use force to combat "unlawful obstructions, combinations, or assemblages of persons, or rebellion," a description which certainly encompassed the Sons of Liberty.[40] Throughout the war, Lincoln *did* use force against the Sons of Liberty and similar groups, particularly in border states.[41] Although Milligan was not a member of the Confederate military, he – like Al-Marri – was accused of belonging to an "enemy" organization against which the president could use military force.

Moreover, Milligan and his co-petitioners *were* accused of "associating themselves" with the Confederacy,[42] and of "affording aid and comfort to

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[39] Petition for Rehearing and Rehearing En Banc at 13 (June 27, 2007), *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007) (No. 06-7427).

[40] Act of July 29, 1861, ch. 25, 12 Stat. 279. For comparison of force authorization statutes see Part I.B, *infra*.

[41] McPherson at 274.

[42] *See* Curtis A. Bradley, *The Story of Ex Parte Milligan: Military Trials, Enemy Combatants, and Congressional Authorization in* Presidential Power Stories, at 25 (2008) ("The petitioners in Milligan were in fact alleged to be 'associated

Rebels against the authority of the United States." According to one specification, Milligan and his co-petitioners actively worked to induce a Confederate invasion and intended to cooperate with the invaders.[43] At trial, evidence showed that Dodd's plot to take Camp Morton was financed by large sums of Confederate money and that both Dodd and William Bowles had significant associations with Confederate agents.[44]

The similarity between the allegations against Milligan and those against Al-Marri is underscored by the Fourth Circuit's various attempts to define "enemy combatant." Though a five-judge majority of that court agreed that Al-Marri was an "enemy combatant," they could not agree on what that term meant. In three separate opinions, those five judges offered alternative definitions. What all three definitions have in common, however, is that they plainly would include Lambdin Milligan and his co-petitioners, who stood accused of conduct every bit as "war-like" and "belligerent" as anything of which Al-Marri stands accused. These include:

- An enemy combatant "attempts or engages in belligerent acts against the United States, either domestically or in a foreign combat zone

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with' enemy armed forces, and they were specifically charged with (and convicted by a military commission of) violating the laws of war.").

[43] O.R. at 75.

[44] O.R. at 114.

. . . on behalf of an enemy force." Pet App. 163a-164a (Williams, C.J., joined by Duncan, J.), or

- An enemy combatant is "a member of . . . an organization or nation against whom Congress has declared war or authorized the use of military force, and . . . knowingly plans or engages in conduct that harms or aims to harm persons or property for the purpose of furthering the military goals of the enemy nation or organization." Pet. App. 253a-254a (Wilkinson, J.), or
- Al-Marri is an "enemy combatant" because he is allegedly associated with al Qaeda and had the "purpose of committing hostile and war-like acts." Pet. App. 90a (Traxler, J., joined by Niemeyer, J.).

This parallel between the two cases is not lessened by the statement in *Milligan* that the petitioners were "in nowise connected with the military service," 71 U.S. at 121-22, or this Court's later characterization of Lambdin Milligan as a "non-belligerent." *Ex parte Quirin*, 317 U.S. 1, 45 (1942). In each instance, the Court did not assert that the alleged conduct of Milligan and the Sons of Liberty was neither war-like nor belligerent. Rather, the Court was noting that because Milligan was not a member of the military of an enemy nation, he was not a combatant under traditional law of war principles. The same is true of Al-Marri, who has no alleged association with an enemy nation. The alleged actions of both, however, fall

within the definitions of enemy combatant offered by the government and the judges of the court below. Wherever the line is drawn between combatants and civilians, Al-Marri and Milligan fall on the same side of that line.

B. The Statutes That Framed *Milligan* Parallel The Statutes That Frame This Case

Because Congress was not in session during the first three months of the Civil War, President Lincoln took several military steps unilaterally, including calling up troops and ordering a blockade of Southern ports.[45] When Congress convened in July 1861, it ratified Lincoln's actions[46] and approved a broad grant of authority to use military force to put down the rebellion. In the Act of July 29,[47] styled "An Act to provide for the Suppression of the Rebellion against the Resistance to the Laws of the United States," Congress provided that:

> . . . whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the judgment of the President of the United States, to enforce, by

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[45] *See* Proclamation Calling Militia and Convening Congress (April 15, 1861), *reprinted in* 4 The Collected Works of Abraham Lincoln 331-32 (1953)

[46] Act of August 6, 1861, ch. 63, 12 Stat. 326.

[47] Act of July 29, 1861, ch. 25, 12 Stat. 279.

> the ordinary course of judicial proceedings, the laws of the United States . . . it shall be lawful for the President of the United States to employ such parts of the land and naval forces of the United States as he may deem necessary to enforce the faithful execution of the laws of the United States, or to suppress such rebellion . . . .

Like the Authorization for Use of Military Force[48] passed by Congress after the September 11, 2001 attacks (the "AUMF"), the 1861 Act was not a traditional declaration of war, but rather an authorization of military force against a broad class of persons who threatened rebellion or disruption of the rule of law, a category that included Milligan and the Sons of Liberty. But, also like the current AUMF, Congress did not unleash military power across the nation or provide for a new system of justice in areas where regular legal institutions were unimpaired.[49]

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[48] Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001)

[49] Former Senate Majority Leader Tom Daschle, who played a key role in negotiating the AUMF, has written the following about that negotiation:

> Literally minutes before the Senate cast its vote [on the AUMF], the administration sought to add the words 'in the United States and' after 'appropriate force' in the agreed-upon text. This last minute change would have given the president broad authority to exercise expansive powers not just overseas – where we all understood he wanted the authority to act – but right

In both crises, Congress adopted later legislation that defined the president's power to detain persons found in parts of the United States where the courts were open for regular business. For Milligan, the relevant statute was the Habeas Corpus Act of 1863.[50] After considering its response to Lincoln's unilateral suspension of the writ, Congress enacted a law that allowed the president to suspend habeas corpus, but with several limitations.[51] Sections 2 and 3 of that Act directed federal courts to discharge any military prisoners – other than prisoners of war – who were held in states where the "administration of the law continued unimpaired" and who were not indicted in a timely fashion by a grand jury. All nine Justices in *Ex parte Milligan* held that, under the Habeas Corpus Act, Milligan and his co-petitioners were

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> here in the United States, potentially against American citizens. I could see no justification for Congress to accede to this extraordinary request for additional authority. I refused.

Tom Daschle, Editorial, *Power We Didn't Grant*, Wash. Post, Dec. 23, 2005, at A21.

[50] Act of March 3, 1863, ch. 81, 12 Stat. 755. For discussion of legislative history of the Act, see Charles Fairman, History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-1868, Part One at 185-87 (1971) (hereafter "Fairman").

[51] *See* David J. Barron & Martin S. Lederman, *The Commander-in-Chief at the Lowest Ebb: A Constitutional History*, 121 Harv. L. Rev. 941, 1005-07 (2008); Paul Finkelman, *Limiting Rights in Times of Crisis: Our Civil War Experience – A History for Post 9/11 America*, 2 Cardozo Pub. L. Pol'y & Ethics 25, 31-41 (2003)

entitled to discharge from military custody. In his concurring opinion, Chief Justice Chase observed that they came "within the precise letter and intent" of this statute. 71 U.S. at 134.

In this case, too, a later congressional enactment is directly on point. Shortly after approving the AUMF, Congress turned to what became known as the USA PATRIOT Act ("Patriot Act").[52] The purpose of the legislation was to "Provide Appropriate Tools Required to Intercept and Obstruct Terrorism" within the United States. According to numerous published reports, the Executive Branch initially sought a provision that would allow for the indefinite detention of "terrorist aliens" found within the United States.[53] That provision was rejected in the final version of the Patriot Act.[54] As with the Habeas Corpus Act in

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[52] Pub. L. No. 107-56, 115 Stat. 272 (2001)

[53] *See* Neil A. Lewis & Philip Shenon, *Senate Democrat Opposes White House's Antiterrorism Plan and Proposes Alternative*, N.Y. Times, Sept. 20, 2001 ("[I]f we change from 24 to 48 hours before deciding whether to charge someone, well, I can understand that," Mr. Leahy said. "But I don't think we need to talk about indefinite detention."); Robin Toner, *Bush Law Enforcement Plan Troubles Both Right and Left*, N.Y. Times, Sept. 28, 2001 ("Senator Arlen Specter, Republican of Pennsylvania, is worried about the administration's proposal to allow the indefinite detention of immigrants if they are deemed to be threats to national security. Senator Edward M. Kennedy, Democrat of Massachusetts, shares those objections.").

[54] Neil A. Lewis & Robert Pear, *Negotiators Back Scaled-Down Bill to Battle Terror*, N.Y. Times, Oct. 2, 2001 ("[T]he compromise bill . . . omits or scales back some of the measures

1863, Congress denied the president some of the powers he sought. In the final bill, Section 412(a) allows for extended, but not unlimited, detention of aliens suspected of engaging in terrorist activity or affiliating with a terrorist organization.[55] Under that Act, "terrorist aliens" may be held without charges for up to seven days. At that time, either criminal or removal proceedings must commence.[56] This provision applies to resident aliens like Al-Marri, who are suspected of being terrorists. Like Lambdin Milligan, Al-Marri fits "within the precise letter and intent" of a statute enacted after a generally worded authorization of military force. In both instances, the later limitation controls the procedures that apply to the individual detained.

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the Bush administration sought, notably the authority to detain immigrants suspected of terrorism indefinitely without charges. . . . The proposal for indefinite detention of immigrant suspects engendered the greatest opposition from civil libertarians both inside and outside of Congress."); Robin Toner & Neil A. Lewis, *Bill Greatly Expanding Surveillance Power in Terrorism Fight Clears Senate*, N.Y. Times, Oct. 12, 2001 ("[The Senate compromise bill] would also strengthen the authorities' ability to detain terrorism suspects, although it would not provide the indefinite detention the administration originally sought.").

[55] 8 U.S.C. §1226a(a)(1), (3).

[56] 8 U.S.C. §1226a(a)(5).

II. The Individuals Who Vindicated Lambdin Milligan's Rights Vigorously Supported An Aggressive War Policy

Many who defended Milligan's legal rights as a U.S. resident despised his subversive activities. Those individuals – especially future president James A. Garfield and Justice Davis – illustrated that a commitment to the rule of law is entirely consistent with a stern defense of the nation.[57]

A. The Role Of Future President James A. Garfield

When Milligan's case reached the Supreme Court in March of 1866, his legal team was ideologically diverse. Jeremiah Black, his principal counsel, was a Pennsylvania Democrat who served

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[57] Several prominent military officials – including Brigadier General Henry B. Carrington, and his commanding officer, General Samuel Heintzelman, the commander of the Department of Ohio – thought Milligan and the others should be tried in civilian court. *See* Foulke at 419; Fairman at 195-96 n.54. Though he doggedly pursued the Sons of Liberty, Carrington saw his role as gathering sufficient evidence to indict them in Federal Court and resisted intense pressure from Indiana's Governor Oliver Morton to use the military to arrest and try the Order's leaders. He wrote that he "believ[ed] that the Federal Courts, then open, backed by Military Authority, could more wisely adjudicate the case, and with less political excitement." Fairman at 196-196 n.54. Only after both Carrington and Heintzelman were removed from command were Milligan and the others arrested and tried by military commission. Gilbert Tredway, Democratic Opposition to the Lincoln Administration in Indiana 222 (1973).

as Attorney General and Secretary of State under President James Buchanan.[58] David Dudley Field was a New York Republican and the brother of then-Justice Stephen J. Field, a Lincoln appointee who would join Justice Davis' opinion for the Court. The most notable of Milligan's advocates, however, was Republican Congressmen James A. Garfield of Ohio, a strident advocate of an aggressive war policy throughout the Civil War.

An ardent abolitionist, Garfield was an Ohio state senator when hostilities began in 1861. After volunteering for military service, he won command of the 42nd Ohio Volunteer Infantry. Garfield distinguished himself in combat in Kentucky, rising to the rank of Colonel and then Major General, seeing extensive fighting in Kentucky and Tennessee. In 1862, while still in the army, he was elected to represent a staunchly Republican district in northeastern Ohio.[59] Garfield expected the war to be over by the time he would take office in December 1863, but the war was then still raging. He nearly resigned his seat so he could continue on the battlefield, but President Lincoln advised him that

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[58] As adviser to President Buchanan, Black had publicly denied the constitutionality of secession and urged the defense of Fort Sumter. For insight into Black's views of the War, see Speech of Honorable Jeremiah S. Black at the Democratic Mass Convention, in Lancaster city (Sept. 17, 1863), *available at* http://www.accesspadr.org:2005/cdm4/document.php?CISOROOT=/sstlp-cw&CISOPTR=142&REC=8.

[59] *See* Allan Peskin, Garfield: A Biography 146 (1978) (hereafter "Peskin").

he needed pro-administration legislators more than he needed generals.[60] Garfield resigned his military commission and moved to Washington.

In Congress, Garfield joined the House Military Affairs Committee and established a reputation as a militant Republican.[61] Garfield later told a friend, "I have never been anything else but a radical on all these questions of Freedom and Slavery, rebellion and the war."[62] According to his biographer, Garfield "had only contempt for those who advocated a negotiated peace" and "insisted on relentless prosecution of the war to total victory." He urged aggressive measures against the South, including the confiscation and redistribution of Southern property and the execution of Confederate leaders. Garfield warned in a speech that "not by smiles, but by thunderous volleys must the rebellion be met, and by such means alone." He concluded that "the South must be beaten to its knees, and to ensure its eternal submission, the twin props of the Rebellion – slavery and landed estates – must be abolished."[63] In another controversial speech, Garfield singled out two Democratic colleagues, by name, and called them traitors.[64] He publicly flirted with the idea of supporting a more militant

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[60] *Id.* at 219.

[61] *Id.* at 228-29.

[62] *Id.* at 232.

[63] *Id.* at 233.

[64] *Id.*

Republican challenger to Lincoln in the 1864 election.[65]

Despite his pro-war views, Garfield expressed disquiet over the use of military tribunals in the loyal states of the North.[66] Because of that stand, he was approached to argue Milligan's case.[67] Though Garfield had only contempt for people like Milligan and his co-petitioners, he agreed that they were entitled to a jury trial. He accepted the challenge as a matter of conscience, without compensation.[68]

Garfield argued that the president's power to prosecute the war derived from Congressional authorization and was limited by legislation. "In sixteen carefully considered laws," he told the Court, "the national legislature undertook to provide for every contingency, and arm the executive at every

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[65] *Id.* at 237.

[66] Garfield was not alone among militant Republicans in questioning the use of military commissions in the loyal states. His views were echoed by an editorial in the staunchly Republican *Indianapolis Daily Journal* published just three days after the highly-publicized raid on Harrison Dodd's print shop. *See* Editorial, The Indianapolis Daily Journal, Aug. 23, 1864, *reprinted in* Elisheva R. Coleman, *Call it Peace or Call it Treason: The Milligan Case and the Meaning of Loyalty in the Civil War*, at 39 (2005) (thesis, Princeton University), *available at* http://web.princeton.edu /sites/jmadison/awards/2005-Coleman_Thesis.pdf.

[67] Peskin at 270-71; *See also* Fairman at 204 (describing Garfield's performance as "pertinent, persuasive, and candid").

[68] Peskin at 271; Fairman at 596.

point with the solemn sanction of law."[69] He added that "[t]hroughout the eleven rebellious States, [Congress] clothed the military department with supreme power and authority," but in the loyal states, it gave the military significant but not unfettered powers.[70] Garfield insisted that despite "all these capacious powers . . . conferred on the military department . . . there is no law on the statute book, in which the tribunal that tried the petitioner can find the least recognition."[71]

As Garfield made this argument, he was also supporting legislation to authorize the use of military tribunals in the formerly Confederate States.[72] He insisted that Congress "must lay the heavy hand of the military authority upon these rebel communities, and hold them in its grasp" in order to establish "law and peace where anarchy and violence now reign."[73] Garfield explained that the bill was "not a proposition to commit the liberties of the Republic into the hands of the military," but rather "commanding the Army to return to its work of putting down the rebellion." That Garfield could argue so strenuously for Milligan's right to a jury trial while supporting military commissions in the occupied South underscores a key aspect of the

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[69] 71 U.S. at 97.

[70] *Id.* at 99.

[71] *Id.* at 100.

[72] *See* Act to Provide for the More Efficient Government of Rebel States, ch. 153, 14 Stat. 428 (1867).

[73] Fairman at 596.

Milligan ruling. Military commissions, for Garfield and for this Court, were appropriate in an occupied, formerly belligerent state that refused to enforce the law, but not in a loyal state with free and functioning courts.[74]

B. The Role Of Justice David Davis

Of the nine Justices who ruled unanimously in favor of Milligan and his co-petitioners, five were appointed by President Lincoln.[75] Justice David Davis, a Republican and longtime friend of President Lincoln, drafted the more strongly worded of the two opinions, and the one that found that Milligan's discharge was compelled by the Constitution as well as by statute. Those joining the Court opinion included Justice Field (a Lincoln-appointee) and Justice Robert C. Grier, who wrote the majority opinion in *The Prize Cases*, 67 U.S. (2 Black) 635 (1862), which upheld Lincoln's action in ordering the Southern blockade without prior congressional authorization. The concurring opinion in *Milligan*, which rejected the Government's claimed detention authority on purely statutory grounds, was prepared

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[74] Justice Davis, author of the majority opinion in *Milligan*, emphasized this distinction: "Not a word is said in the opinion about Reconstruction and the power [to try people by military commission] is conceded in the insurrectionary States." Letter from Justice David Davis to Judge Julius Rockwell (Feb. 24, 1867), *reprinted in* Fairman at 232-34.

[75] Chief Justice Salmon P. Chase, Justice David Davis, Justice Noah H. Swayne, Justice Stephen J. Field, and Justice Samuel F. Miller. For a concise description of the entire *Milligan* Court, see Rehnquist at 6.

by Chief Justice Salmon P. Chase, an Ohio Republican and staunch abolitionist who served as Lincoln's Treasury Secretary and was a friend and mentor to Garfield.[76]

Justice Davis' pivotal role in the case included ensuring that Milligan's claim actually reached the Court. With Indiana District Judge David McDonald, Davis (as circuit justice) initially heard Milligan's habeas claim.[77] Both judges believed strongly in the merits of Milligan's petition, but knew that the case would automatically be referred to the Supreme Court only if they announced a split decision.[78] They therefore feigned disagreement and certified their supposed split decision to the Supreme Court. In order to prevent the case from being mooted by the petitioners' pending executions, Davis and McDonald together wrote a lengthy letter to President Andrew Johnson, asking that he stay the scheduled executions pending the outcome of the case.[79] Davis also visited Indiana Governor Oliver Morton to seek his support for the effort to stay Milligan's execution.[80] His efforts were successful. The Supreme Court heard oral arguments two

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[76] *See* Peskin at 154-57.

[77] Fairman at 197.

[78] Fairman at 200.

[79] Letter from Justice David Davis and Judge David McDonald to President Andrew Johnson (May 11, 1865), *reprinted in* Fairman at 198-99.

[80] Foulke at 428.

months later, giving the case priority over everything else on its docket.[81]

Justice Davis' central role gains resonance from his close relationship with President Lincoln. William Herndon, Lincoln's law partner, wrote that of Lincoln's many Illinois friends, the "oldest and most zealous and effective was David Davis. . . . It is not extravagance, taking their long association together in mind, to say that Davis had done more for Lincoln than any dozen other friends he had."[82] In 1860, Davis was Lincoln's manager and chief negotiator at the Republican National Convention and was instrumental in securing Lincoln's nomination.[83] After Lincoln died, Davis served as executor of his estate.[84]

His relationship with Lincoln did not color Davis' views of the legality of military commissions in loyal states. To the contrary, Davis told the president of his dismay over their use. In a letter to

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[81] Fairman at 200; Rehnquist at 6.

[82] William H. Herndon and Jesse W. Weik, Herndon's Lincoln 501 (1888) (hereafter "Herndon"); *see also* Albert A. Woldman, Lawyer Lincoln 263 (1936) ("[O]f all the men working on Lincoln's behalf, none were more sincere, tireless, resourceful, and faithful than his constant boon companion of the Eighth Circuit – Judge David Davis.").

[83] Herndon at 463; *see generally* Willard L. King, Lincoln's Manager: David Davis (1960).

[84] William Hanchett, Out of the Wilderness: The Life of Abraham Lincoln 81 (1994).

Herndon dated September 10, 1866,[85] Davis related what he told Lincoln during the war:

> Mr. Lincoln was advised, and I also so advised him, that the various military trials in the Northern and Border States, where the courts were free and untrammeled, were unconstitutional and wrong; that they would not and ought not to be sustained by the Supreme Court; that such proceedings were dangerous to liberty.

Davis added a remarkable additional claim: "I am fully satisfied therefore that Lincoln was opposed to these military commissions, especially in the Northern States, where everything was open and free."[86]

CONCLUSION

This Court should apply the teachings of *Milligan* to this case. At a time when a bloody civil war threatened the survival of the nation, *Milligan* held that the president could not impose military detention and trial on an alleged member of a terrorist organization in Indiana, a state that at the time "was a military district, was the theatre of military operations, had been actually invaded, and was constantly threatened with invasion." 71 U.S. at 140 (Chase, C.J., concurring). Today, a band of

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[85] Letter from Justice David Davis to William Herndon (Sept. 10, 1866), *reprinted in* Herndon at 556.

[86] *Id.*

foreign-based plotters can surely do great harm to Americans, but they pose far less risk to the integrity of the nation or its government. Under *Milligan*, both the Constitution and statutory law bar the president from detaining a legal resident who is alleged to belong to a terrorist organization at a time when no threat of invasion exists, in a place where no military operations are contemplated and while the courts remain open and functioning.

For all of these reasons, and those stated in the briefs of Petitioner and his supporting amicus curiae, the decision below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,

Petitioner,

—v.—

COMMANDER DANIEL SPAGONE,
U.S.N., CONSOLIDATED NAVAL BRIG,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE COMMONWEALTH LAWYERS ASSOCIATION AND JUSTICE AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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STATEMENT OF INTEREST[1]

The Commonwealth Lawyers Association (the "CLA") is a body dedicated to the rule of law throughout the Commonwealth. All Law Societies and Bar Associations of the 53 countries comprising the Commonwealth are institutional members of the CLA. Four signatories to this brief (Ben Emmerson QC, Alex Bailin, Helen Law and Timothy Otty QC) are practising members of the Bar of England and Wales, and one is a member of the CLA (Timothy Otty QC). The CLA has submitted *amicus* briefs in a number of recent cases before this Court.

JUSTICE was founded in 1957 as an independent human rights and law reform organisation. It is the British section of the International Commission of Jurists. JUSTICE has a long history of intervening in cases involving important matters of public interest, especially involving the protection of fundamental rights; not only in the English Courts but also before the Privy Council, the European Court of Human Rights and the European Court of Justice.

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[1] The parties have consented to the filing of this brief. The Petitioner and Respondent have each filed a letter of consent to all *amicus* briefs with the Clerk of the Court. No counsel for any party authored this brief either in whole or in part, and no persons other than the *amici curiae* and their legal counsel made any monetary contribution to its preparation or submission.

This brief is submitted in support of the Petitioner, but the CLA and JUSTICE wish to make it clear that they do not presume to examine or comment directly on the judgment of the Court of Appeals (Fourth Circuit) in this case. The main purpose of this brief is to explain the basis on which the courts of England and Wales have approached the issue of executive detention without trial.

We hope this may assist this Court for the following reasons:

1. Because the most recent attempt to enact a system of executive detention without trial in England and Wales was made in direct response to the terrorist attacks committed in the United States on 11 September 2001;

2. Because, when determining the legality of executive detention without trial, the English courts have had regard to fundamental rights and other principles of universal application, such as the rule of law, which concepts are common to both the English and American jurisdictions;

3. Because this Court has recently taken into account relevant English laws and jurisprudence governing, for example, the origins of habeas corpus in determining the legality and constitutionality of those detained by the military at Guantanamo Bay Naval Base.

All of the parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

In English law, executive detention without trial is not generally permissible and is contrary to the rule of law and the right to liberty. This is clear from an analysis of the most recent attempts to introduce detention without trial.

The United Kingdom Government sought in 2001 [2] to introduce a system of preventative detention without trial for foreign nationals (but not British citizens) suspected of having links with terrorism. That attempt was abandoned following a decision by the House of Lords [3] that such detention did not comply with the right to liberty contained in Article 5 of the European Convention on Human Rights ("the European Convention") and was discriminatory and disproportionate. Following that ruling of the House of Lords, the United Kingdom Government did not attempt to extend the ambit of the 2001 Act to British citizens so as to alleviate any discrimination, even though the threat to which that Act was directed emanated partly from British citizens. The legislation which was enacted in its place (a system of "control

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[2] See Part IV of the Anti-terrorism, Crime and Security Act 2001 ("the 2001 Act").

[3] *A and others v Secretary of State for the Home Department* [2005] 2 AC 68.

orders"[4]) has not been successfully used to deprive anyone of his liberty[5] but does apply to British citizens and foreign nationals alike. There have, however, been a number of successful prosecutions of high profile international terrorist suspects, usually with links to Al-Qaida and foreign training camps, which have resulted in substantial sentences of imprisonment.[6]

The scheme in the 2001 Act was held to be unlawful by the House of Lords, notwithstanding the intended safeguards it contained. For example, it required an express "derogation" from the right

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[4] See the Prevention of Terrorism Act 2005.

[5] To date only "non-derogating" control orders have been made by the executive – such orders may not deprive a person of his liberty. The House of Lords in *Secretary of State for the Home Department v JJ and others* [2008] 1 AC 385 recently ruled on the permissible limits of non-derogating control orders (e.g. an 18-hour house curfew did amount to deprivation of liberty).

[6] For example, *R v Kyham & others* [2008] EWCA Crim 1612 concerned an advanced terrorism conspiracy described by the Court of Appeal (at paragraph 7) as extending "over three continents. Its objective was to further the conspirators' perverted view of the cause of Islam by using violence wherever possible, but in particular in the UK, with proposed terrorist attacks on the London Underground, nightclubs, public houses and synagogues. ... some of the conspirators, including [the lead conspirator] Khyam, had attended a training camp in Pakistan where they were given training in the use of explosives." In 2007, five men were convicted of conspiracy to cause explosions likely to endanger life or cause serious injury to property and all received life sentences (with minimum tariffs of between 17 and 20 years). Their appeals against conviction were unsuccessful.

to liberty in the European Convention because preventative detention was not within one of the permissible types of detention prescribed by Article 5. The United Kingdom Parliament was therefore required to determine, when enacting the 2001 Act, whether there was a "public emergency threatening the life of the nation" such that a derogation from the right to liberty was "strictly necessary" [7]

Moreover, although under the 2001 Act the Secretary of State had the power to designate a person as a suspected terrorist and therefore detain him indefinitely, that classification was reviewed by an independent and impartial civilian court (the

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[7] Article 15 of the European Convention provides:

> (1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
>
> (2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
>
> (3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

"Special Immigration Appeals Commission (SIAC)"). Although the detainee was not necessarily entitled to see all the material relied upon in support of his detention, any "closed" material which was withheld from him could be seen in entirety by a "special advocate" instructed to represent his interests before SIAC. The legality of the entire system of detention without trial and the legality of any individual's detention could be appealed up through the English courts in the ordinary way.

The only form of detention without trial which currently exists in England and Wales is therefore "pre-charge detention". This is so even though the United Kingdom Government still contends that there is (since 11 September 2001) an ongoing public emergency threatening the life of the nation, [8] and notwithstanding the terrorist

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[8] See, for example, The Government Reply to the Nineteenth Report from the Joint Committee on Human Rights, "*Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*", Session 2006-07, HL Paper 157, HC 394 (Cm 7215), September 2007, p.16, stating "...the Government's position on whether or not we face a public emergency has never changed in the intervening period [since the 2001 Act]. Our decision not to derogate from Article 5 for the purposes of control orders does not reflect an assessment that we no longer face a public emergency threatening the life of the nation. Indeed, it is clear that the threat from international terrorism to the UK has increased since 2001." See also, the evidence of the Home Secretary, Jacqui Smith, to the Joint Committee on Human Rights on 28 October 2008, confirming the Government's view that there remains an ongoing public emergency in the United Kingdom: *Minutes of Evidence Taken Before Joint Committee on Human Rights*, HC 1142i, question 25.

attacks on London in July 2005 which killed 52 civilians. Pre-charge detention enables the police[9] to detain a person who is the subject of a criminal terrorist investigation for a period of up to 28 days.[10] At the end of the 28-day period the detainee must be charged with a criminal offence or released. This highly limited power of detention without trial must be sanctioned by a judge[11] (within 48 hours' of the initial detention and typically for periods of no more than 7 days at a time) who must be satisfied that the ongoing criminal investigation is being diligently pursued and that it is necessary to detain the suspect during the investigation. If there is no ongoing investigation, or if the aim of the investigation is not to bring criminal charges, there can be no lawful detention.

The legality of the 28-day period of pre-charge detention has not yet been ruled upon by the English courts[12] or by the European Court of Human Rights. The United Kingdom Government's two attempts to introduce longer

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[9] For detention up to 14 days, applications are made by the police. Between 14 and 28 days, all applications to extend pre-charge detention are made by the Crown Prosecution Service.

[10] Schedule 8 of the Terrorism Act 2000 as amended by sections 23-25 of the Terrorism Act 2006.

[11] Up to 14 days the application is to a designated magistrate; between 14 and 28 days it is to a High Court judge.

[12] A preliminary challenge (inability of the judge to grant bail to such a pre-charge detainee) was made in *R(I) v City of Westminster Magistrates' Court* [2008] EWHC 2146 (Admin).

periods of pre-charge detention (90 days and 42 days) both failed because of insufficient Parliamentary support. Pre-charge detention was the subject of unprecedented levels of Parliamentary scrutiny and debate. The debates focused in detail on the reasons why the Government said an extension to the current power was necessary; how the particular proposed length of extension could be justified; how the power could be reconciled with the right to liberty in the English common law; all possible alternatives to an extension; the precise wording of the provisions and the safeguards they contained, or could include. In 2007 the Government accepted that: "How far the limit should be extended should be a matter for consultation and debate, but we agree that a maximum limit should be set by Parliament."[13]

Any attempt to introduce detention without trial in the United Kingdom has been made with clear and specific express words in proposed legislative provisions. There is no recent example of any attempt to detain a person executively that has not sought to comply with this elementary requirement of the English common law and the fundamental principle of legality.

We emphasise that we do not herein make any direct submissions on the President's power

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[13] The Government Reply to the Nineteenth Report from the Joint Committee on Human Rights, *"Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning"*, op cit., question 10.

and authority under the Constitution and Authorization for Use of Military Force to order the military to detain the Petitioner. But by considering the way in which the English courts have analyzed detention without trial, it is hoped that this Court will be assisted by the fundamental principles governing the issue in deciding how to approach and dispose of this appeal, which clearly raises matters of considerable public importance.

ARGUMENT

I. EXECUTIVE DETENTION WITHOUT TRIAL IS GENERALLY CONTRARY TO THE RULE OF LAW.

The (9-judge) House of Lords in *A and others v Secretary of State for the Home Department* [2005] 2 AC 68 (commonly known as "the *Belmarsh*[14] case") ruled (by a majority of 8-1) that the scheme of executive detention without trial contained in Part IV of the Anti-terrorism Crime and Security Act 2001 violated the right to liberty contained in Article 5 of the European Convention. Although the House of Lords ultimately allowed the appeal on the basis that the 2001 Act was discriminatory and disproportionate and therefore that the measures contained in it were not "strictly required" by the exigencies of the situation[15], their

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[14] Since many of the detainees in question were held at Belmarsh prison in London.

[15] Other grounds of appeal which were before their Lordships during the *Belmarsh* appeal (e.g. the admissibility in SIAC of

Lordships emphasized the fact that detention without trial was generally contrary to the rule of law. Lord Nicholls, for example, at paragraph 74 said:

> "Executive detention is anathema in any country which observes the rule of law. It deprives the detained person of the protection a criminal trial is intended to afford."

Lord Hoffmann said at paragraph 86:

> "This is one of the most important cases which the House has had to decide in recent years. It calls into question the very existence of an ancient liberty of which this country has until now been very proud: freedom from arbitrary arrest and detention. The power which the Home Secretary seeks to uphold is a power to detain people indefinitely without charge or trial. Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom."

Lord Hope at paragraph 100 explained that:

> "It is impossible ever to overstate the importance of the right to liberty in a democracy. In the words of Baron Hume,

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evidence obtained by torture) formed the basis of a subsequent successful appeal: *A and others v Secretary of State for the Home Department (No. 2)* [2006] 2 AC 221.

Commentaries on the Law of Scotland respecting Crimes, 4th ed. (1844), vol. 2, p 98:

> "As indeed it is obvious, that, by its very constitution, every court of criminal justice must have the power of correcting the greatest and most dangerous of all abuses of the forms of law,—that of the protracted imprisonment of the accused, untried, perhaps not intended ever to be tried, nay, it may be, not informed of the nature of the charge against him, or the name of the accuser." "

Lord Hope went on to say that Baron Hume:

> "knew the dangers that might lie in store for democracy itself if the courts were to allow individuals to be deprived of their right to liberty indefinitely and without charge on grounds of public interest by the executive. The risks are as great now in our time of heightened tension as they were then."

Lord Bingham had (at the time he was the senior law lord) also said (extra-judicially):

> "Freedom from executive detention is arguably the most fundamental and probably the oldest, the most hardly won and the most universally recognised of human rights. Yet in times of emergency, crisis and serious disorder it is almost the first right to be

> curtailed. It is in that sense vulnerable... The exercise of exceptional executive powers calls for exceptional vigilance on the part of all whose duty it is to hold the executive to account."[16]

The context of the decision in the *Belmarsh* case is important to understanding the strength of the sentiment expressed by their Lordships. The United Kingdom Government introduced the 2001 Act to Parliament two months after the devastating terrorist attacks perpetrated on the United States of America on 11 September 2001.

Part IV of the 2001 Act granted the executive the power to certify that it reasonably believed a person's presence in the United Kingdom to be a risk to national security and reasonably suspected him to be a terrorist. A terrorist for this purpose included a person who: (a) was or had been concerned in the commission, preparation or instigation of acts of international terrorism; (b) was a member of or belonged to an international terrorist group; or (c) had links with an international terrorist group. A certified person was then liable to indefinite executive detention. Those persons in fact certified and detained had never been the subject of criminal prosecution for the activities said to justify their detention, save one who was acquitted at trial.

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[16] Lord Bingham, *Personal Freedom and the Dilemma of Democracies* (2003) 52 ICLQ 841 at 842, 857.

Part IV of the 2001 Act was characterized as an immigration power, and therefore only applied to foreign nationals. Prior to the 2001 Act, it was only possible to detain a foreign national pending deportation, so that if deportation was found to be unlawful, the person would have to be released. The 2001 Act obviated that consequence by providing that a foreign national who could not be deported could nonetheless be detained indefinitely.

At the same time as introducing the 2001 Act, the Government derogated from the right to liberty in Article 5(1) of the European Convention, on the basis that:

> "The terrorist attacks in New York, Washington, D.C. and Pennsylvania on 11th September 2001 resulted in several thousand deaths, including many British victims and others from 70 different countries. In its resolutions 1368 (2001) and 1373 (2001), the United Nations Security Council recognised the attacks as a threat to international peace and security.
>
> The threat from international terrorism is a continuing one. In its resolution 1373 (2001), the Security Council, acting under Chapter VII of the United Nations Charter, required all States to take measures to prevent the commission of terrorist attacks, including by denying safe haven to those who finance, plan, support or commit terrorist attacks.

> There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom."[17]

Their Lordships' comments about the rule of law and executive detention must therefore be read in the context of the very serious terrorist threat posed to the United Kingdom which the United Kingdom Government contended existed at that time. The 11 September attacks were described variously by their Lordships as "atrocities on an unprecedented scale... intended to disable the governmental and commercial power of the United States" [18], "horrific" [19], and "unheralded" [20]

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[17] Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001/3644). Corresponding steps were taken to derogate from Article 9 of the International Covenant on Civil and Political Rights 1966, which is similar in effect to Article 5 of the European Convention, although (unlike Article 5) not incorporated into domestic law.

[18] Lord Bingham at paragraph 6.

[19] Lord Scott at paragraph 154.

[20] Lord Rodger at paragraph 166.

Notwithstanding this grave context, their Lordships could not reconcile the conflict between the rule of law and the scheme of executive detention which the 2001 Act authorized.

II. EXECUTIVE DETENTION IS CONTRARY TO THE RIGHT TO LIBERTY.

Baroness Hale explained the position succinctly at paragraphs 222-223 of the *Belmarsh* case:

> "Executive detention is the antithesis of the right to liberty and security of person. Yet that is what the 2001 Act allows."

Indeed the Government must have accepted that executive detention without trial was contrary to the right to liberty since otherwise a derogation from Article 5 (right to liberty) of the European Convention would not have been necessary.[21]

Although the House of Lords ultimately decided the *Belmarsh* case on the basis of incompatibility of the 2001 Act with the right to liberty contained specifically in Article 5, it

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[21] The United Kingdom Government reserved its right to argue (in the European Court of Human Rights) that a derogation from Article 5(1)(f) was not in fact required – it did not make that submission in the English courts. The judgment of the Grand Chamber of the European Court of Human Rights in the *Belmarsh* case is awaited.

recognised (as has this Court) that the right to liberty is an ancient right:

Lord Bingham noted, at paragraph 36, that in emphasizing:

> "... the fundamental importance of the right to personal freedom ... the appellants were able to draw on the long libertarian tradition of English law, dating back to chapter 39 of Magna Carta 1215, given effect in the ancient remedy of habeas corpus, declared in the Petition of Right 1628, upheld in a series of landmark decisions down the centuries and embodied in the substance and procedure of the law to our own day."

Lord Hoffmann reiterated at paragraph 88:

> "... I would not like anyone to think that we are concerned with some special doctrine of European law. Freedom from arbitrary arrest and detention is a quintessentially British liberty, enjoyed by the inhabitants of this country when most of the population of Europe could be thrown into prison at the whim of their rulers. It was incorporated into the European Convention in order to entrench the same liberty in countries which had recently been under Nazi occupation. The United Kingdom subscribed to the Convention because it set out the rights which British subjects enjoyed under the common law."

The fundamental importance of the right to liberty also re-enforces its role as part of the rule of the law. In *Aksoy v Turkey* (1996) 23 EHRR 553 at paragraph 76:

> "The court would stress the importance of article 5 in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the state with his or her right to liberty. Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in article 5(3), which is intended to minimise the risk of arbitrariness and to ensure the rule of law."

Previously, a 7-day period of pre-charge detention (if sanctioned by a judge) used in Northern Ireland required an express derogation from the right to liberty under the European Convention, which was only possible because there was held to be a public emergency threatening the life of the nation which justified such a measure.[22] A 4-day period of pre-charge detention (without access to a judge during that time) was held to violate the right to liberty.[23] Accordingly, it is far from clear, particularly in the absence of any accompanying derogation from the right to liberty,

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[22] *Brannigan and McBride v United Kingdom* (1994) 17 EHRR 539.

[23] *Brogan v United Kingdom* (1998) 11 EHRR 117.

that the current 28-day pre-charge detention power in the United Kingdom would be considered compatible with the right to liberty by the European Court, or indeed by the English courts.

Article 9 of the International Covenant on Civil and Political Rights 1966 ("ICCPR") [24] is expressed in terms very similar to those of Article 5 of the European Convention, and has led to the promulgation of "The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR" (1985) 7 HRQ 3. Lord Bingham quoted the Principles with approval at paragraph 36 of the *Belmarsh* case:

> "The authors of the "Siracusa Principles", although acknowledging that the protection against arbitrary detention (article 9 of the ICCPR) might be limited if strictly required by the exigencies of an emergency situation (article 4), were none the less of the opinion that some rights could never be denied in any conceivable emergency and, in particular (para. 70 (b)), "no person shall be detained for an indefinite period of time, whether detained pending judicial investigation or trial or detained without charge ..." "

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[24] The ICCPR is not incorporated directly into English domestic law.

III. A STATE OF WAR OR THE EXISTENCE OF A PUBLIC EMERGENCY DOES NOT PREVENT THE COURTS FROM DETERMINING THE LEGALITY OF EXECUTIVE DETENTION.

Even "amid the clash of arms"[25], a court must never surrender the constitutional duties placed upon it. The United States and other jurisdictions have recognised that even "in times of distress, the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability." [26] It is submitted that the constitutional duty of a court includes its inherent and inalienable power to consider whether any legislative measure accords with the rule of law. That duty is sacrosanct when the legislative measure under consideration is executive detention without trial: a power which, on its face, would, if upheld without proper judicial scrutiny, undermine the very foundations of democracy.

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[25] *per* Lord Atkin in *Liversidge v Anderson* [1942] AC 206 at 244.

[26] Patel J in *Korematsu v US* 584 F. Supp (1984) 1406 (ND Cal 1984) at 1420 (quoted by Lord Bingham at paragraph 41 of the *Belmarsh* case). See also the Israeli Supreme Court decisions in *Public Committee Against Torture v State of Israel* (1999) 7 BHRC 31 (HCJ 5100/94, 6 September 1999) at paragraph 39 (*per* President Barak); *Beit Sourik Village v Govt. of Israel* (HCJ 2056/04, 30 June 2004) at paragraphs 36ff.

Thus, even though the existence of a public emergency and the associated national security issues might traditionally have been regarded as examples of non-justiciability *par excellence,* the House of Lords in the *Belmarsh* case declined to so treat them, when fundamental rights were at stake. Indeed the House of Lords in the *Belmarsh* case ruled upon whether there was a public emergency threatening the life of the nation, and decided that there was (by a majority of 8-1) but that the measures contained in the 2001 Act were nevertheless not strictly required by that emergency.

The House of Lords expressly rejected the submission that it was undemocratic for them (not being accountable to the electorate) to adjudicate upon matters such as the existence of a public emergency. As Lord Bingham observed at paragraph 42:

> "the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself."

Lord Bingham also quoted with approval Simon Brown LJ, who had observed in *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, paragraph 27, that "the court's role under the [Human Rights Act] 1998 ... is as the guardian of

human rights. It cannot abdicate this responsibility." He went on to say, in para 54:

> "Constitutional dangers exist no less in too little judicial activism as in too much. There are limits to the legitimacy of executive or legislative decision-making, just as there are to decision-making by the courts."

Adopting that approach, the House of Lords carefully scrutinized the legislative choice of immigration legislation as the appropriate response to a threat which was nationality-neutral. The House of Lords concluded that the 2001 Act, being exclusively directed to foreign nationals, was not strictly required by the exigencies of the situation which included a threat which emanated in part from British citizens.

Lord Hoffmann at paragraph 89 of the *Belmarsh* case considered the historical context of the "public emergency" justification which the Government relied upon post-9/11 in support of the 2001 Act:

> "There have been times of great national emergency in which habeas corpus has been suspended and powers to detain on suspicion conferred on the Government. It happened during the Napoleonic Wars and during both World Wars in the 20th century. These powers were conferred with great misgiving and, in the sober light of retrospect after the emergency had passed, were often found to

> have been cruelly and unnecessarily exercised."

Lord Hoffmann went on to observe at paragraph 97 in relation to the 2001 Act:

> "In my opinion, such a power in any form is not compatible with our constitution. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve."

The importance of the rule of law is not diluted in any way by the existence of a war or other public emergency. For example in Resolution 1271 adopted on 24 January 2002, the Parliamentary Assembly of the Council of Europe held that "The combat against terrorism must be carried out in compliance with national and international law and respecting human rights". The Committee of Ministers of the Council of Europe on 11 July 2002 adopted *"Guidelines on human rights and the fight against terrorism"*. These recognised the obligation to take effective measures against terrorism, but continued:

> "All measures taken by states to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment ..."

The European Convention itself is intended to provide for the protection of the rule of law in a democracy[27] and any interpretation of the rights and freedoms it guarantees has to be consistent with its general spirit as an instrument designed to maintain and promote the ideals and values of a democratic society. The right not to be arbitrarily deprived of personal liberty and to enjoy equality before the law and a fair trial are crucial aspects of the rule of law and democratic government. Thus in *Kurt v Turkey* (1998) 27 EHRR 373, paragraph 122, the European Court referred to "the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities".

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[27] The fourth and fifth recitals in the Preamble to the European Convention provide:

"Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration"

IV. ANY ATTEMPT TO ENACT EXECUTIVE DETENTION REQUIRES CLEAR AND EXPRESS WORDS.

In English law, Parliament should not be taken to have intended to legislate so as to override fundamental human rights (including the rights to liberty) except by clear and specific express words or by necessary implication.[28] The courts should construe strictly any statutory provision purporting to allow the deprivation of individual liberty by administrative detention.[29] Where there is any uncertainty in a legal provision, it must be resolved in favour of the liberty of the individual.[30]

As Lord Hoffmann explained in *R v Home Secretary ex p Simms* [2000] 2 AC 115 at paragraph 131, the need for clear and express words is to

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[28] Lord Hoffmann in *R v Home Secretary ex p Simms* [2000] 2 AC 115, 131 and Lord Hobhouse in *R (Morgan Grenfell) v Special Commissioner of Income Tax* [2003] 1 AC 563 at paragraph 45.

[29] See the decision of the Judicial Committee of the Privy Council, considering an appeal from the Court of Appeal of Hong Kong in *Tam Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97, at 111E.

[30] See the Judicial Committee of the Privy Council, considering an appeal from the Court of Appeal of Trinidad and Tobago, in *Naidike v A-G of Trinidad and Tobago* [2005] 1 AC 538 at paragraph 48. The Committee went on to note: "*The governing principle is that a person's physical liberty should not be curtailed or interfered with except under clear authority of law.*"

ensure that Parliament fully understood and scrutinized what, precisely, it was consenting to:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. ... The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."[31]

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[31] Lord Hoffmann's comments have since been cited with approval by the Federal Court of Australia in *Minister for Immigration and Citizenship v Haneef* [2007] FCAFC 203, and by the House of Lords in the second *Belmarsh* case, *A (No. 2)* (op cit.) at paragraph 51, by Lord Bingham.

In English and human rights law this concept is part of the "principle of legality": that any attempted interferences with fundamental rights must be prescribed by law, sufficiently accessible and ascertainable in advance and ought to comply with the requirements of legal certainty.

The legislative attempt to enact executive detention in the 2001 Act was in clear and express terms. The 2001 Act contained specific provisions authorising preventative detention on specified grounds and detailed the review mechanism for the legality of the detention.

Equally, the attempts between 2005 and 2008 to extend pre-charge detention beyond 28 days were proposed with express statutory words. Of course, those proposals were widely debated by the public and extensively scrutinised by Parliament, where they ultimately failed to achieve the necessary support. It is of note that the 90 day proposal was rejected by Parliament just four months after the July 2005 terrorist attacks in London, and constituted the only defeat in Parliament of the Government of the former Prime Minister, Tony Blair, during his ten years in office.

CONCLUSION

Executive detention without trial has been used historically in the United Kingdom; in the Napoleonic Wars and both World Wars in the 20th century. But as Lord Hoffmann in the *Belmarsh* case noted, those powers were conferred with great

misgiving and, with sober retrospect, were often found to have been cruelly and unnecessarily exercised[32]. They are not, in the 21st century, precedents, but a cautionary note to the dangers inherent in executive detention.

The 2001 Act therefore remains the most recent relevant attempt to enact a regime of executive detention without trial in the United Kingdom. The decision and reasoning of the House of Lords in the *Belmarsh* case is the clearest, most contemporary exposition of the incompatibility of such detention with the rule of law and the right to liberty in the United Kingdom. The decision was made in the context of a public emergency threatening the life of the nation, directly resulting from the events of 11 September 2001, which (a majority of) the House of Lords held existed at the time.

If it were the United Kingdom, and not the United States of America, which had sought to detain a person without any prospect of facing criminal trial by reliance on a general military authorization to use necessary and appropriate force, such detention would, in accordance with English and human rights law as recently interpreted by the House of Lords, be contrary to the rule of law and the right to liberty, as well as in clear violation of the requirement that any infringement upon liberty be made only with clear and express words. The existence of a public

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[32] Paragraph 89, excerpted above.

emergency threatening the life of the nation (even if arising out of the attacks of 11 September 2001 and 7 July 2005) would not affect that conclusion. We are, furthermore, unaware of any authority indicating that the position would be significantly different in any other Commonwealth State.

Dated: January 28, 2009

Respectfully submitted,

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IN THE

Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,

Petitioner,

v.

COMMANDER DANIEL SPAGONE,
U.S.N., CONSOLIDATED NAVAL BRIG,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR CONSTITUTIONAL, CRIMINAL PROCEDURE, AND OTHER LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the Authorization for Use of Military Force (AUMF), 115 Stat. 224, authorize—and if so does the Constitution allow—the seizure and indefinite military detention of a person lawfully residing in the United States, without criminal charge or trial, based on a determination that the detainee conspired with al Qaeda to engage in terrorist activities?

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INTEREST OF *AMICI CURIAE*

Amici, listed in the Appendix, are constitutional, criminal procedure, and other legal scholars whose research and teaching touch upon the issues raised in this case.[1] *Amici* respectfully submit that although this Court has approved a limited number of civil detention schemes that have superficial similarities to petitioner's, those approved detentions in no way suggest that the government may indefinitely confine petitioner without criminal process.

SUMMARY OF ARGUMENT

The government has detained petitioner Ali Saleh Kahlah al-Marri, without criminal process, for more than seven years, and it asserts a power to continue his detention indefinitely. Pet. App. 8a. The Executive has issued a determination accusing al-Marri of serious crimes, Pet. App. 466a-67a, but his confinement cannot be a punishment for those crimes because he has not been charged or convicted. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("As [he] was not convicted, he may not be punished."). Thus, if al-Marri's confinement is lawful, it must be sustained as a civil detention — a narrow category of confinement that may be imposed without criminal process.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

This Court has previously considered challenges to military detentions imposed without the safeguards of the criminal justice system.[2] As al-Marri's brief demonstrates, *see* Pet. Br. 48-55, those decisions do not sanction the extraordinary detention power that is claimed here.

The Court has also approved a limited number of civil detention schemes outside of the military context, such as ones involving mentally ill persons, sexually violent predators, or pretrial detainees. Some of these schemes bear superficial similarities to al-Marri's detention. For example, some have as their central purpose the incapacitation of persons found to be dangerous, much as the government contends that al-Marri's detention is necessary to prevent him from aiding al Qaeda. Pet. App. 467a. And some constitutionally valid civil detentions may be of indefinite duration, just as the government asserts a power of indefinite detention here. But, as demonstrated below, this Court's decisions concerning civil detentions provide no authority to indefinitely detain al-Marri without charge or conviction.

Criminal process, with its many safeguards, is the primary and near-exclusive means by which the government may impose prolonged confinement. And so it must remain, lest the government resort to civil

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[2] *See, e.g.*, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Moyer v. Peabody*, 212 U.S. 78 (1909); *Ex parte Quirin*, 317 U.S. 1 (1942); *Ludecke v. Watkins*, 335 U.S. 160 (1948); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

detention to lower its burden of proof or free itself from other constraints when pursuing goals that are rightly the object of criminal prosecution.

The limited civil confinements held to be constitutionally sound by this Court are meaningfully distinct from al-Marri's confinement. First, where the government would detain for an indefinite duration a person lawfully present in the United States on the ground of dangerousness, this Court has required it to prove that the detainee suffers from a severe mental disorder or other impairment that makes it difficult or impossible to control his dangerous behavior—a factor that is not present here. Second, to pass constitutional muster, civil detention cannot be punitive in either its purpose or its conditions. Al-Marri's detention, however, appears to be punitive in both aspects: after first being criminally charged, he was transferred to military custody only after, reportedly, he refused to provide information, and his conditions of confinement are, according to some of his former jailers, unduly harsh. Third, civil detention schemes have been upheld only in circumstances where the criminal process would be inadequate to serve the government's legitimate interest in confinement, because the rationale for detention—being mentally ill, for example, cannot be criminalized. Here, however, if the government's accusations are true, al-Marri has engaged in criminal acts and it is wholly unclear why ordinary criminal punishment would not vindicate its interest in detention.

Nor do the civil detention cases sustain the government's claim to have statutory authority to confine al-Marri indefinitely. The government contends,

and the Fourth Circuit held, that the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001), implicitly gave it such authority. The civil detention schemes approved by this Court, however, were not founded on any implicit grant of power. Rather, they were established by clear legislative statements, as is appropriate where the government would act in an area so fraught with constitutional concerns and would bear the heavy burden of proving a constitutionally proper legislative purpose.

For these reasons, and others set forth below, the Court's acceptance of a narrow category of permissible civil detention schemes in no way suggests that the government's confinement of al-Marri is somehow freed of the ordinary constraints placed on the fearsome power of incarceration.

ARGUMENT

I. With Carefully Limited Exceptions, the Criminal Process—Requiring Charge, Conviction, and Other Safeguards—Is the Sole Means by Which the Government May Deprive a Person of Liberty.

"Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (citing *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)). Accordingly, this Court has "always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty." *Id.* (citing *United States v. Salerno*, 481 U.S. 739, 750 (1987)). The Federal Constitution expressly guarantees a remedy to vindicate this right in all but

the most extraordinary circumstances, allowing the writ of habeas corpus to be suspended only "when, in cases of rebellion or invasion the public safety may require it." U.S. CONST. art. I, § 9, cl. 2.

The primary means by which the government may impose prolonged detention is, of course, by criminal prosecution. Numerous constitutional and other safeguards inhibit the government from exercising criminal process in an arbitrary or unfair manner. Among these safeguards are the right to be free from unreasonable searches and seizures;[3] the requirement that arrest be based on probable cause to believe that the arrestee has committed a crime;[4] the right to be informed of certain rights before a custodial interrogation;[5] the right to effective assistance of counsel;[6] the right to indictment by a grand jury for serious crimes;[7] the right to reasonable notice of the charged offense;[8] the right to trial by an impartial jury;[9] the right to a speedy and public trial;[10] the presumption of innocence;[11] the requirement that the government

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[3] U.S. CONST. amend. IV.

[4] *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975).

[5] *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

[6] U.S. CONST. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

[7] U.S. CONST. amend. V.

[8] U.S. CONST. amend. VI; *In re Oliver*, 333 U.S. 257, 273 (1948).

[9] U.S. CONST. amend VI; U.S. CONST. art. III, § 2, cl. 3.

[10] U.S. CONST. amend VI.

[11] *Coffin v. United States*, 156 U.S. 432, 453 (1895).

prove beyond a reasonable doubt every fact necessary to make out the charged offense;[12] the privilege against self-incrimination;[13] the right to confront and cross-examine witnesses;[14] the right to present witnesses and use compulsory process;[15] the government's duty to disclose exculpatory evidence;[16] the prohibition against double jeopardy;[17] the prohibitions against bills of attainder and *ex post facto* laws;[18] the rule of lenity;[19] and the prohibition against selective prosecution.[20]

These protections are routinely provided because our system of government, "with only narrow exceptions . . . , incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law." *Foucha*, 504 U.S. at 83; *see also Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("this Court has said that government detention violates [the Due Process] Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and narrow nonpunitive circumstances") (internal quotation marks and citations omitted); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality) ("In our

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[12] *In re Winship*, 397 U.S. 358, 364 (1970).

[13] U.S. CONST. amend. V.

[14] U.S. CONST. amend. VI.

[15] U.S. CONST. amend. VI.

[16] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

[17] U.S. CONST. amend. V.

[18] U.S. CONST. art. I, § 9, cl. 3, § 10, cl. 1.

[19] *United States v. Bass*, 404 U.S. 336, 347 (1971).

[20] *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

society liberty is the norm, and detention without trial is the carefully limited exception.") (internal quotation marks omitted).[21]

In the rare circumstances in which it has been judged permissible, civil detention, while still subject to due process constraints, provides substantially fewer protections than are afforded by criminal process. Thus, the grounds for civil detention must remain strictly limited, so that the government cannot use it to effectuate punishment or to escape the comprehensive constraints of the criminal justice system. *Kansas v. Crane*, 534 U.S. 407, 412 (2002) (noting that civil commitment must not "become a mechanism for retribution or general deterrence") (internal quotation marks omitted); *Hamdi*, 542 U.S. at 556-57 ("It is unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing.") (Scalia, J., dissenting).

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[21] *See also* THE FEDERALIST No. 84 (Alexander Hamilton)

> 'To bereave a man of life, . . . without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person . . . is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.'

(*Quoting* 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 131-133 (1765)).

II. The Indefinite Detention of al-Marri without Charge or Conviction Finds No Support from the Limited Group of Permissible Preventive Detention Schemes.

While criminal process must remain the near-exclusive means of prolonged detention, there are "a limited number of well-recognized exceptions." *Hamdi*, 542 U.S. at 556 (Scalia, J., dissenting). These historically grounded confinements are often called *preventive*—as opposed to *punitive*—detentions, because they typically aim to prevent the occurrence of a future harm. Preventive detention schemes that have been found to be constitutionally permissible include confinements based on mental health;[22] public health (quarantine);[23] juvenile jurisdiction;[24] pre-trial confinement in criminal proceedings;[25] and pre-hearing confinement in immigration proceedings.[26] Any superficial similarities aside, the Court's acceptance of these preventive detention schemes provides no basis to sustain al-Marri's indefinite confinement, notwithstanding the Executive's conclusion that "detention of Mr. al-Marri is necessary to prevent him from aiding al-Qaeda." Pet. App. 467a.

Civil confinement raises particularly serious constitutional concerns when it is of indefinite duration,

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[22] *See Addington v. Texas*, 441 U.S. 418 (1979).

[23] *See O'Connor v. Donaldson*, 422 U.S. 563, 586 (1975) (Burger, C.J., concurring).

[24] *See Schall v. Martin*, 467 U.S. 253 (1984).

[25] *See Salerno*, 481 U.S. at 739.

[26] *See Zadvydas*, 533 U.S. at 678.

as this Court has recognized. *See Zadvydas*, 533 U.S. at 696. As the Court's precedents show, the fact that an intended detainee is dangerous is not, by itself, sufficient for the government to impose indefinite detention outside of criminal process. Rather, the Court has allowed the government to impose *indefinite* civil detention only when dangerousness is accompanied by an additional factor, such as severe mental illness, that makes it difficult or impossible for the detainee to control his dangerous behavior. No mental disorder or other impairment to self-control is asserted to justify al-Marri's detention here.

Constitutionally valid civil detentions share two additional aspects: they cannot be punitive in either purpose or condition, and they have been imposed only where criminal process would be inadequate to serve the government's legitimate interest in confinement. The absence of both features here confirms that al-Marri's detention is meaningfully different from the schemes previously permitted by this Court.

A. This Court Has Rejected the Notion That Dangerousness Alone Is a Sufficient Ground for Civil Detention of Indefinite Duration.

The Executive has determined that al-Marri presents a danger to national security and should therefore be indefinitely detained. Pet. App. 467a. Some civil detentions approved by this Court have similarly involved claims that the detainees are too dangerous to be released. The Court has been clear, however, that civil detention of indefinite duration cannot be justified by dangerousness alone. *See, e.g., Crane*, 534 U.S. at 412 (holding that proof of a repeat sex offender's dangerousness is not a sufficient ground for indefinite civil commitment); *Foucha*, 504 U.S. at 82-83.

To be sure, dangerousness is a crucial factor in certain established preventive detention schemes, which, like al-Marri's detention, may be of indefinite duration. For example, where the government civilly commits sexual predators or mentally ill persons, the confinement must rest on a finding that the detainee poses a danger to himself or others. *Kansas v. Hendricks*, 521 U.S. 346, 357-58 (1997). But proof of dangerousness, by itself, will not suffice. Rather, this Court has required the government to have "proof of some additional factor . . . . that makes it difficult, if not impossible, for the person to control his dangerous behavior." *Id.* at 358.

Accordingly, the Court has sustained preventive detention schemes that require—in addition to dangerousness—that the detainee have a "mental abnormality" or "personality disorder," *id.*; be "mentally ill," *Addington*, 441 U.S. at 426; have a "mental disorder," *Allen v. Illinois*, 478 U.S. 364, 370-71 (1986); be "mentally retarded," *Heller v. Doe*, 509 U.S. 312, 314-15 (1993); or have a "psychopathic personality," *Minnesota ex rel. Pearson v. Probate Court of Ramsey Cty.*, 309 U.S. 270, 271-72 (1940). Such confinements may last for as long as the necessary grounds for detention are present, and thus may be of indefinite duration. *Hendricks*, 521 U.S. at 363-64; *Jones v. United States*, 463 U.S. 354, 368-69 (1983).

As this Court explained in *Hendricks*, which upheld a law providing for civil commitment of sexual predators, the effect of requiring a mental disorder or similar impairment is to "narrow[] the class of persons eligible for confinement to those who are unable to control their

dangerousness." 521 U.S. at 358. Where indefinite detention is concerned, this limitation on the class of potential detainees is constitutionally compelled. *Zadvydas*, 533 U.S. at 691 ("In cases in which preventive detention is of potentially *indefinite* duration, we have . . . demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness . . . ."); *Crane*, 534 U.S. at 413 (2002) ("there must be proof of serious difficulty in controlling behavior").[27]

Thus, where a state sought to indefinitely confine, without criminal conviction, a person who was dangerous but had no accompanying mental disorder, this Court held the detention unconstitutional. In *Foucha*, *supra*, the Court considered the continued involuntary confinement of an insanity acquittee whose mental illness was in remission but who had an "antisocial personality," which, a lower court found, "rendered him a danger to himself or others." 504 U.S. at 74-75, 78. This Court concluded that the asserted justification for detention—dangerousness alone—was "not enough to defeat Foucha's liberty interest under the Constitution in being freed from indefinite confinement." *Id.* at 82; *see also Jones*, 463 U.S. at 368 ("The committed acquittee is entitled to release when he has recovered his sanity *or* is no longer dangerous.") (emphasis added).

The requirement that an impairment to self-control, in addition to dangerousness, be proved to justify

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[27] To the extent that quarantine may result in indefinite confinement, it can be justified by the same rationale—the detainee's inability to control the spread of the dangerous contagion.

indefinite detention serves important constitutional purposes. It prevents the government from relying on civil detention as the principal means of controlling recidivists or other persons whose past behavior warrants an inference of dangerousness. *See Crane*, 534 U.S. at 413 ("[T]he severity of the mental abnormality . . . must be sufficient to distinguish the [civil detainee] from the dangerous but typical recidivist convicted in an ordinary criminal case."); *Foucha*, 504 U.S. 82-83 (rejecting a rationale for indefinite confinement that could be applied to "any convicted criminal, even though he has completed his prison term"). Relatedly, it gives effect to the requirement that there be an *actus reus* to complete a criminal offense, and to the constitutional prohibition against criminalizing mere status—safeguards that would have no force if the government could "preventively" detain persons on the basis of dangerousness alone. *See Robinson v. California*, 370 U.S. 660 (1962) (striking down a law criminalizing the status of narcotic addiction).[28]

While this Court has, in isolated circumstances, approved civil detentions based solely on dangerousness, it has done so only when the confinement was adjunct

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[28] Prohibiting indefinite confinement on the ground of mere dangerousness has philosophical underpinnings as well. Absent some volitional impairment or similar disorder, indefinite *anticipatory* confinement—*i.e.*, a possible life sentence imposed to prevent a voluntary act that the detainee may never choose to take—is fundamentally at odds with the concept of individual liberty. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.2, at 195 (2d ed. 1986) ("[T]he common law crimes are defined in terms of act or omission to act, and statutory crimes are unconstitutional unless so defined.").

to proper criminal (or juvenile) jurisdiction and was limited in duration. For example, in *Schall*, *supra*, the Court upheld a state law providing for brief pretrial detention of accused juvenile delinquents based on a finding of serious risk that the detainee may, before the return date, commit a criminal act. 467 U.S. at 255. Unlike al-Marri's detention, confinement under the law upheld in *Schall* could last only for a brief period. The "maximum possible detention" for juveniles "accused of a serious crime" was just 17 days, and only six days for those accused of less serious offenses. *Id.* at 270. The Court held that the state's legitimate interest in "protect[ing] the child and society from the potential consequences of his criminal acts" was sufficient to warrant such detention. *Id.* at 264. Emphasizing the short period of confinement, the Court observed that "[t]hese time frames seem suited to the limited purpose of providing the youth with a controlled environment and separating him from improper influences pending the speedy disposition of his case." *Id.* at 270-71.

Similarly, in *Salerno*, *supra*, this Court upheld a law providing for adult pretrial detention of arrestees if the government proved that no release condition would reasonably assure the safety of others or the community. 481 U.S. at 741. As in *Schall*, the Court underscored the limited period of confinement, explaining that "the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act."[29]

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[29] The Speedy Trial Act provides that trial or other disposition of cases involving a person "being held in detention solely because he is awaiting trial . . . shall be accorded priority," 18 U.S.C. § 3164(a)(1), and that trial of such persons "shall commence not later than ninety days following the beginning of such continuous detention," *id.* § 3164(b).

Id. at 747. When, in *Foucha*, this Court later invalidated a statute providing for *indefinite* detention on the sole ground of dangerousness, it relied on the time limitations of pretrial detention to distinguish *Salerno*: "It was emphasized in *Salerno* that the detention we found constitutionally permissible was strictly limited in duration. Here, in contrast, . . . [Foucha] may be held indefinitely." 504 U.S. at 82 (citing *Salerno*, 481 U.S. at 747; *Schall*, 467 U.S. at 269).[30]

This Court distinguished *Salerno* on the same ground when considering the constitutional implications of indefinite detention of lawfully admitted aliens in *Zadvydas*. 533 U.S. at 691 (citing *Salerno*, 481 U.S. at 747). There, to avoid "serious constitutional concerns," the Court construed a federal statute to contain "an implicit 'reasonable time' limitation" to the government's power to detain aliens subject to a final order of removal. *Id.* at 682. *Zadvydas* did not, as the Court noted, involve a claim of "terrorism" as a ground for indefinite detention, as this case does. *Id.* at 696. But *Zadvydas* did address more generally the notion that dangerousness provides a constitutionally sufficient

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[30] Other varieties of temporary confinement may be justified not because of the dangerousness of the detainee but because they are incidental to criminal process and necessary for that process to function properly. *See Bell v. Wolfish*, 441 U.S. 520, 523 (1979) (approving detention to ensure detainees' presence at trial); *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975) (approving detention to await a probable cause determination after arrest); *cf. Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (holding that the state may detain an arrestee who is incompetent to stand trial only long enough to determine if he could become competent). Here, al-Marri's detention is not adjunct to any criminal or other proceeding.

basis for indefinite confinement. The statute construed there permitted prolonged detention, incidental to the immigration and deportation process, if the alien was "determined . . . to be a risk to the community." *Id.* at 682. And indeed, both aliens whose detentions were reviewed by this Court had engaged in dangerous acts. *Id.* at 684 ("Zadvydas has a long criminal record."); *id.* at 685 ("Ma was involved in a gang-related shooting."). The Court nonetheless read into the statute an implied presumption that the period of detention would not exceed six months, because of the "serious constitutional problem" that would otherwise be raised. *Id.* at 690, 701.[31]

Taken together, the Court's preventive detention decisions make clear that it has not permitted indefinite confinement based on dangerousness alone. Accordingly, those decisions give no support to the power of indefinite detention claimed by the government here.

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[31] The Court has been more permissive of detentions of aliens who have *not been allowed entry* to the United States. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (upholding indefinite detention of alien at Ellis Island); *cf. Zadvydas*, 533 U.S. at 692-93 (distinguishing *Mezei*). *Mezei* is of no help to the government here, because al-Marri lawfully entered and legally resided in this country. Pet. App. 12a. The government concedes that legal residents such as al-Marri have the same due process rights to be free from unlawful detention as U.S. citizens. Pet. App. 65a. Indeed, because the AUMF makes no distinctions between aliens and citizens, *see Hamdi*, 542 U.S. at 519 (plurality opinion), the government has consistently argued that the statute authorizes it to detain citizens as well, *see* Pet. App. 28a, 39a n.14 (Motz, J.), and it has twice done so, in the cases of Yaser Hamdi and Jose Padilla.

B. Unlike Preventive Detentions Held to Be Constitutionally Valid, al-Marri's Detention Has Punitive Purposes and Conditions and Serves Governmental Purposes Fully Achievable by Normal Criminal Process.

The indefinite detention of al-Marri differs from permissible civil detentions in two additional respects. First, to comply with the Due Process Clause, civil detention must not be punitive in either purpose or with regard to the physical conditions of confinement, and al-Marri's detention appears to be punitive in both aspects. Second, civil detentions have been approved only when criminal process would be inadequate to serve the government's legitimate interest in confinement, and that is not the case here.

This Court has not sustained a civil detention scheme where the restriction on liberty is punitive in purpose or where the physical conditions of confinement are punitive, since a governmental interest in punishment must be vindicated through criminal process. *Salerno*, 481 U.S. at 746-48; *Bell*, 441 U.S. at 535-37. Here, al-Marri's confinement appears to be punitive in both respects. The government's purpose could not have been preventive because al-Marri was already properly detained criminally, with no prospect for imminent release, when he was declared an enemy combatant and transferred to military custody.[32] Pet. App. 54a n.19

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[32] Al-Marri was in solitary confinement, and had been for some eighteen months, when the President deemed him a "present . . . danger to the national security of the United States." Pet. App. 467a.

(Motz, J., concurring in the judgment). Moreover, there were reports that al-Marri was transferred because he had become a "hard case" by "reject[ing] numerous offers to improve his lot by . . . providing information." *Id.* (quoting JOHN ASHCROFT, NEVER AGAIN: SECURING AMERICA AND RESTORING JUSTICE 168-69 (2006)). If so, the purpose of the detention is to punish al-Marri for non-cooperation, which is not a valid objective for civil confinement. Further, the conditions of al-Marri's detention have been reported to be unduly punitive. *See* Pamela Hess, *Officer Wrote of Harsh Treatment of U.S. Detainee*, L.A. TIMES, Oct. 10, 2008, at A2 (reporting that officers at the Naval Brig had warned Pentagon officials that detainees, including al-Marri, were being "driven nearly insane by months of punishing isolation and sensory deprivation"). Such conditions, even if assumed to be constitutional under some set of facts, are not justified by the goal of incapacitation. *See Hendricks*, 521 U.S. at 346; *Salerno*, 481 U.S. at 747; *Schall*, 467 U.S. at 270-72; *Bell*, 441 U.S. at 535-37.

A further reason that al-Marri's preventive detention is unlike any scheme sustained by this Court is that the government has not shown that its legitimate interests in confinement cannot be served by the criminal process. *See Foucha*, 504 U.S. at 82 ("the State does not explain why its interest would not be vindicated by the ordinary criminal processes"). Some permissible civil detentions have been based on status determinations—*e.g.*, being mentally ill, or having an infectious disease—that could not constitutionally be criminalized. *Robinson*, 370 U.S. at 660. Others, such

as pretrial detention, occur only while the criminal process is still unfolding. The government's legitimate interests in these confinements could not be served if detention could follow only from a criminal conviction.

The same cannot be said of al-Marri's confinement. Before it deemed him an enemy combatant, the government was prepared to try al-Marri on a seven-count indictment based on conduct connected to his alleged support of terrorism. Pet. App. 13a. If convicted, he would have faced up to 30 years imprisonment after sentencing enhancements for terrorism-related activity. *See* U.S.S.G. § 3A1.4. Many criminal statutes are available to prosecute alleged terrorists, *see, e.g.*, 18 U.S.C. § 2384 (criminalizing conspiracies to overthrow, make war, or oppose by force the government of the United States); 18 U.S.C. § 2339A (criminalizing the provision of "material support or resources" to terrorist organizations including concealing or disguising the source or ownership of material support or resources); 18 U.S.C. § 2332B (criminalizing "acts of terrorism transcending national boundaries"); 18 U.S.C. § 2339C (criminalizing the direct or indirect provision of funds to support terrorist activity), as well as manage the secrecy issues that arise in such prosecutions, *see* Classified Information Procedures Act (CIPA), §§ 1-16, 18 U.S.C. app. 3; Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801-1862; *see generally Hamdi*, 542 U.S. at 548 n.4 ("Even a brief examination of the reported cases in which the Government has chosen to proceed criminally against those who aided the Taliban shows the Government has

found no shortage of offenses to allege.") (Souter, J., concurring in the judgment).

Using such tools, the government has already engaged in many successful terrorism prosecutions. *See, e.g.*, *United States v. Abdi*, 463 F.3d 547, 550 (6th Cir. 2006) (prosecution of suspected al Qaeda terrorist); *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004) (prosecution of al Qaeda conspirator involved in 9/11); *United States v. Reid*, 369 F.3d 619 (1st Cir. 2004) (prosecution of Bin Laden ally who attempted to destroy an airplane with a bomb in his shoe); *United States v. Goba*, 240 F. Supp. 2d 242 (W.D.N.Y. 2003) (prosecution of al Qaeda operatives who met with Bin Laden and trained in terrorist camps in Afghanistan). Indeed, even Jose Padilla, who was for years detained alongside al-Marri as an enemy combatant, was eventually tried and convicted in a federal court and sentenced to 208 months, despite earlier assertions by the Executive that only his civil detention could keep the country safe. *United States v. Padilla*, No. 04-60001-CR (S.D. Fla. Jan. 22, 2008).

III. Because Preventive Detention Schemes Approved by This Court Have All Been Authorized by Clear Legislative Statements, Those Schemes Provide No Support for the View That Congress Implicitly Authorized al-Marri's Detention in the AUMF.

Just as they in no way suggest that al-Marri's detention meets due process requirements, this Court's preventive detention cases give no support to the government's claim to have implicit statutory authority to confine al-Marri. All of the preventive detention schemes that have been sustained by this Court were established by clear legislative statements. *See Hendricks*, 521 U.S. at 346 (Kan. Stat. Ann. 59-29a01 *et seq*); *Salerno*, 481 U.S. at 739 (Bail Reform Act); *Heller*, 509 U.S. at 315 (Ky.Rev.Stat.Ann. §§ 202A.076(2), 202B.160(2) (Michie 1991)); *Schall*,, 467 U.S. at 253 (New York Family Court Act); *Allen*, 478 U.S. at 365 (Illinois Sexually Dangerous Persons Act); *Addington*, 441 U.S. at 418 (Tex. Rev. Civ. Stat., Arts. 5547-31 *et seq*); *Pearson*, 309 U.S. at 371 (Chapter 369 of the Laws of Minnesota of 1939). Such explicit legislative direction is appropriate where the Executive would exercise a power, like indefinite detention, that raises such serious constitutional concerns.

Indeed, as noted above, in *Zadvydas* this Court held that even where a detention scheme is expressly authorized by statute, the Court will resist any interpretation providing for indefinite detention under that scheme, absent a clear statement by Congress, in order to avoid the "serious question as to whether, irrespective of the procedures used, the Constitution

permits detention that is indefinite and potentially permanent." *Zadvydas*, 533 U.S. at 696 (internal citations omitted).

Moreover, in reviewing detention schemes, this Court's jurisprudence places legislative purpose at the center of constitutional legitimacy. It has been the detailed legislative provisions—both of purpose and of limitation—that have enabled the Court to draw the critical constitutional line between impermissible punishment and legitimate regulation. *See Seling v. Young*, 531 U.S. 250, 262 (2001) ("[D]etermining the civil or punitive nature of an Act must begin with reference to its text and legislative history.").

Thus, the Court has closely scrutinized both the legislative intent behind the detention and the details of its implementation to confirm that they are consistent with the goals of civil confinement. *See, e.g.*, *Salerno*, 481 U.S. at 747-48 (examining legislative history and statutory terms to determine whether confinement is regulatory or punitive). Without explicit statutory directives, judicial review of this issue would be frustrated. In this respect as well, the government's claim that the AUMF implicitly authorized the indefinite confinement of al-Marri is not in accord in with this Court's precedents concerning civil detention.

CONCLUSION

For the foregoing reasons, the government's assertion of a power to indefinitely confine al-Marri, without charge or conviction, finds no support from this Court's precedents concerning civil detention.

Respectfully submitted,

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ALI SALEH KAHLAH AL-MARRI,

Petitioner,

v.

COMMANDER DANIEL SPAGONE,
U.S.N., CONSOLIDATED NAVAL BRIG,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF OF CONSTITUTIONAL LAW SCHOLARS BRUCE ACKERMAN, ERWIN CHEMERINSKY, RICHARD A. EPSTEIN, RICHARD H. FALLON, PAMELA S. KARLAN, GEOFFREY R. STONE, KATHLEEN M. SULLIVAN, AND LAURENCE H. TRIBE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the Authorization for Use of Military Force (AUMF), 115 Stat. 224, authorize—and if so does the Constitution allow—the seizure and indefinite military detention of a person lawfully residing in the United States, without criminal charge or trial, based on a determination that the detainee conspired with al Qaeda to engage in terrorist activities?

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INTEREST OF *AMICI CURIAE*[1]

Constitutional law scholars Bruce Ackerman, Erwin Chemerinsky, Richard A. Epstein, Richard H. Fallon, Pamela S. Karlan, Geoffrey R. Stone, Kathleen M. Sullivan, and Laurence H. Tribe submit this brief as *amici curiae* in support of petitioner in this case. The *amici curiae* have studied and written extensively on a range of constitutional law topics, including the separation of powers and individual liberty interests at stake in this case. Specifically,

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[1] The parties have consented to the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

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SUMMARY OF ARGUMENT

This case poses the question whether the President may indefinitely detain as an enemy combatant a lawful U.S. resident who was arrested in U.S. territory on suspicion of conspiring to engage in acts of terrorism.

Concerned about the excesses of executive and military power under British colonial rule, the Founding Generation established a constitution that protects individual liberty through a nearly inviolate prohibition against detention without the protection of a criminal process, the essential features of which are enumerated in the Bill of Rights. Exceptions to that presumption are rare and narrowly confined.

One such exception is the long-established power of the government, in time of war, to detain "enemy combatants" until the end of the conflict. The question here is whether that exception should extend to suspects in the present "war on terror." While arguments can be made in support of extending an old concept to modern circumstances, doing so here would expand, not simply apply, law that was developed in a different time to address a very different kind of conflict.

Whether such an extension should be attempted is a decision the Constitution gives, in the first instance, to Congress, acting in consultation with the Executive branch. While the Constitution confers upon the President war powers as Commander-in-Chief, that power is generally subject to legislative control, particularly when the war powers are exercised domestically and individual liberty is at stake. Indeed, this Court has never upheld domestic

detention of lawful U.S. residents in the absence of clear legislative authorization.

In light of the Constitution's allocation of wartime authority, this Court should require clear authorization from Congress before confronting the difficult constitutional questions that could arise from applying the enemy combatant concept to individuals like petitioner here. Requiring clarity from Congress avoids possibly unnecessary constitutional rulings in a delicate area, while also honoring the Constitution's strong presumption in favor of individual liberty and criminal process. It also vindicates Congress's prerogatives and, most importantly, encourages an inter-branch dialogue regarding the necessity, wisdom, and limits of any expansion of military detention authority over the domestic population.

In this case, the general language of the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)—which simply authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . ."—does not evidence congressional deliberation and authorization with sufficient clarity.

ARGUMENT

I. Treating Individuals Lawfully Within The United States As Enemy Combatants Based On Suspicions Of Involvement In Terrorism Would Constitute A Significant Expansion Of Traditional Executive Detention Powers.

1. The Founding Generation "viewed freedom from unlawful restraint as a fundamental precept of liberty." *Boumediene v. Bush*, 128 S. Ct. 2229, 2244 (2008); *see Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) ("[T]he most elemental of liberty interests [is] the interest in being free from physical detention by one's own government.") (plurality opinion). Indeed, "[e]xecutive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned . . . save by the judgment of his peers or by the law of the land." *Rasul v. Bush*, 542 U.S. 466, 474 (2004) (citation omitted).

By the time of the Founding, English law had recognized for almost six centuries that to deprive a person of liberty "without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom." 1 WILLIAM BLACKSTONE, COMMENTARIES 136; *see also* THE FEDERALIST No. 84, at 480 (Alexander Hamilton) (Clinton Rossiter ed. 1991) (decrying "the practice of arbitrary imprisonments" as "the favorite and most formidable instruments of tyranny"). Those who had survived colonial military rule were particularly aware of the threat to liberty posed by military involvement in domestic affairs, including military detention of

alleged enemies of the state. *See, e.g.*, *Duncan v. Kahanamoku*, 327 U.S. 304, 319-20, 323-24 (1946).

As a result, the Founders established a constitution under which "liberty is the norm, and detention without trial is the carefully limited exception." *Hamdi*, 542 U.S. at 529 (internal quotation marks omitted).[2]

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[2] Both the United States and the Fourth Circuit have recognized that this presumption applies to resident aliens as well as citizens. *See, e.g.*, Pet. App. 19a-21a, 98a-99a. "[L]awful residence implies protection" under our Constitution. *Johnson v. Eisentrager*, 339 U.S. 763, 776 (1950) (citation omitted). Indeed, most constitutional protections against arbitrary detention apply by their terms to resident aliens and citizens alike. *See, e.g.*, U.S. CONST. amend. V ("no *person* shall be deprived of . . . liberty . . . without due process of law") (emphasis added); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270-71 (1990) (cataloging constitutional protections enjoyed by aliens lawfully residing in the United States). And "[b]ecause the Constitution's separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles." *Boumediene v. Bush*, 128 S. Ct. 2229, 2246 (2008) (citations omitted).

Resident aliens do enjoy reduced protection, relative to citizens, in some areas. For instance, they are subject to limited executive detention related to deportation, *see Zadvydas v. Davis*, 533 U.S. 678, 689 (2001), and can be detained for the duration of a declared war if they are citizens of an enemy nation, *see Ludecke v. Watkins*, 335 U.S. 160 (1948). But the United States has not suggested that this case falls within any such exception.

In *Hamdi*, this Court considered one such carefully limited exception,[3] explaining that the "capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" *Id.* at 518 (quoting *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942)). In light of that historical understanding, the Court rejected the claim that detaining Hamdi as an enemy combatant violated the Constitution, observing that he was captured in a traditional war, fighting on behalf of the Taliban government of Afghanistan against U.S. forces that had invaded the country after the attacks of September 11, 2001. *Id.* at 521-24. For the same reason, the Court construed the general authorization in the AUMF—which plainly contemplated those military operations in Afghanistan—to encompass authority to detain traditional enemy combatants engaged in active fighting there. *Id.* at 518-19.

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[3] There are others as well. For example, convicted sex offenders, *Kansas v. Hendricks*, 521 U.S. 346 (1997), those found to be mentally ill and dangerous, *Addington v. Texas*, 441 U.S. 418 (1979), those found not guilty by reason of insanity, *Foucha v. Louisiana*, 504 U.S. 71 (1992), "recalcitrant witness[es]," *United States v. Wilson*, 421 U.S. 309 (1975), and infectious individuals, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), may be detained in limited circumstances. And in wartime, Congress may authorize executive detention of citizens of an enemy nation. *Ludecke*, 335 U.S. at 173. As the plurality noted below, this Court has "permitted such exceptions only when a *legislative* body has explicitly authorized the exception." Pet. App. 23a n.6. And, in any case, none of the exceptions is claimed as the basis for petitioner's detention in this case.

2. The Fourth Circuit, sitting en banc, held that the AUMF also empowers the President to detain suspects lawfully residing in the United States as enemy combatants in the so-called "war on terror." *See* Pet. App. 7a (per curiam). That conclusion requires an expansion of the concept of an "enemy combatant" beyond the tradition recognized in this Court's prior cases.

The traditional enemy combatant category is well-recognized and easily defined. As this Court explained in *Hamdi*, the law of war developed the concept of the enemy combatant in the context of traditional wars between nations, or between a nation and insurrectionists in a civil war. 542 U.S. at 518-519; *see, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War arts. 3, 4, Aug. 12, 1949, 6 U.S.T. 3316, 7 U.N.T.S. 135 (distinguishing between conflicts of an international character and conflicts not of that character). Accordingly, the core of the concept extends to soldiers of an enemy nation "carrying a weapon against American troops on a foreign battlefield," *Hamdi*, 542 U.S. at 522 n.1, and to spies and saboteurs working for an enemy state who unlawfully enter the United States "with the purpose of destroying war materials and utilities." *Ex parte Quirin*, 317 U.S. at 46.

At the same time, this Court has recognized an outer limit to the category as well. In *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), the Court held that a citizen of Indiana could not be treated as an enemy combatant for participating in a secret society that planned to overthrow the government during the Civil War. *See id.* at 130-31. Although Milligan participated in a conspiracy to commit acts of

violence on behalf of an enemy force during an ongoing war, he had never been a Confederate solider, did not participate in battle, and was arrested in United States, not Confederate, territory. *Id.* at 107. For these reasons, the Court concluded that Milligan should have been tried by a civilian court—not detained as an enemy combatant and tried by military court. *Id.* at 131. Likewise, although this Court has never been called upon to so hold, it seems obvious that the government lacks the authority to detain as enemy combatants members of other violent groups traditionally treated as criminals when lawfully within the United States, including individuals suspected of involvement in domestic terrorism, organized crime, drug cartels, and subversive political groups.[4]

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[4] *See, e.g.*, *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998) (Oklahoma City bombing); *Torres v. United States*, 140 F.3d 392 (2d Cir. 1998) (member of violent Puerto Rican nationalist group Fuerzas Armada de Liberacion Nacional bombed Mobil Oil Building in Manhattan as part of a campaign for Puerto Rico's independence); *United States v. Graham*, 275 F.3d 490 (6th Cir. 2001) (members of the Michigan Militia Wolverines and North American Militia organized themselves in "cells" and prepared for a "war" with the government); *United States v. Dowell*, 430 F.3d 1100 (10th Cir. 2005) (members of the Army of the American Republic set fire to the Colorado Springs office of the IRS); *United States v. Locascio*, 6 F.3d 924 (2d Cir. 1993) (criminal prosecution of Mafia boss); *Rosenberg v. United States*, 346 U.S. 273 (1953) (individuals convicted as spies for Soviet Union); *Dennis v. United States*, 341 U.S. 494 (1951) (prosecution of communists for conspiring to overthrow the U.S. government).

3. Whether modern circumstances justify applying the enemy combatant concept to individuals lawfully residing within the United States and accused of participating in terrorism is an important question. Answering that question affirmatively would require an expansion from the historical core concept.

To be sure, the conflict with terrorism shares some features of a traditional war. Like Hamdi and Quirin, al-Marri is alleged to have conspired to engage in war-like acts against our government. But that fact alone does not distinguish this case from *Milligan* or other instances in which the nation has relied on the criminal justice system to punish and deter similar violent acts against the government. *See supra* note 4. Indeed, the Constitution plainly contemplates that some of the most serious acts of violence against the government will be addressed through the criminal justice system, defining treason to include "levying War" against the United States and providing that "[n]o person shall be convicted of Treason unless on the Testimony of two witnesses to the same overt act, or on Confession in open Court." U.S. CONST. art. III, § 3.

It is also true that this conflict involves the use of military force, supporting the analogy to a traditional war to some extent. But that cannot be determinative either. Congress has authorized the

use of military resources in the "war on drugs,"[5] for example, and no one has ever suggested that the government may detain indefinitely those suspected of drug trafficking for the duration of that conflict.

At the same time, in some important respects the "war on terror" is "entirely unlike . . . the conflicts that informed the development of the law of war." *Hamdi*, 542 U.S. at 521. Among other things, the "war on terror" does not involve a conflict between sovereign states or a civil war within our borders. Each of this Court's prior decisions addressing indefinite detention during wartime has involved such conflicts. *See, e.g.*, *Ex parte Quirin*, 317 U.S. 1 (1942) (World War II), *Ex parte Endo*, 323 U.S. 283 (1944) (same), *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (individual fighting with Taliban government in Afghanistan).[6] In this case, the "war on terror" is a conflict against a "loosely connected . . . global movement of Islamic terrorism." Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2109 (2005). As a consequence, unlike traditional wars, this conflict does not involve soldiers of an enemy

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[5] *See, e.g.*, 10 U.S.C. § 374(b)(3) (authorizing the military to assist civilian law enforcement); *United States v. Del Prado-Montero*, 740 F.2d 113, 114 (1st Cir. 1984) (Navy destroyer captured foreign drug-smuggling ship at sea).

[6] Even the Alien Enemy Act, which is not claimed as a basis for al-Marri's detention but which empowers the President to detain enemy aliens during wartime, applies only when the United States is at war with a "foreign nation or government" and only to citizens or subjects of that nation or government. 50 U.S.C. § 21.

government, a circumscribed field of battle, or any discernable end point, all features of prior conflicts that have served to both delimit the scope of the enemy combatant exception and ease the burden of distinguishing true enemy combatants from common criminals.

Accordingly, the common-law courts that developed the concept of the enemy combatant as part of the law of war (which, in turn, influences the constitutional understanding of the scope of the government's detention power) simply did not have occasion to "confront[] cases with close parallels to this one." *Boumediene*, 128 S. Ct. at 2251. The Court is thus left with the question whether suspects in the "war on terror" are sufficiently similar to combatants in a traditional war (*e.g.*, Quirin and Hamdi)—and sufficiently dissimilar to individuals with a recognized right to the protections of the criminal justice system (*e.g.*, Milligan, McVeigh, and members of the Mafia)—to justify treating them under the rules developed for traditional wars.

As discussed below, there is no need for this Court to resolve that question in this case, and *amici* take no position on it. We do believe, however, that it is important to recognize that extending the enemy combatant exception to those accused of terrorism within the United States raises a myriad of complications and difficulties, as illustrated by the badly fractured decision below, which produced numerous divergent conceptions of an "enemy combatant" in the "war on terror," each subject to extensive criticism. *See*, *e.g.*, Pet. App. 63a (Motz, J., concurring in the judgment); 163a-64a (Williams, J., concurring in part and dissenting in part); 253a-54a

(Wilkinson, J., concurring in part and dissenting in part). At the same time, the risk to fundamental constitutional values is obvious: precisely because the enemy in this conflict is so diffuse and difficult to identify, having no clear indicia of membership and no defined battlefield, the universe of plausible suspects could be enormous. And because there is no historical basis for limiting treatment as an enemy combatant to noncitizens, *see Hamdi*, 542 U.S. at 519, the proposed expansion of executive detention authority places every person in the United States, citizen and alien alike, at risk of erroneous deprivation of liberty without recourse to the procedures of the criminal justice system that the Founders established precisely in order to assuage concerns about the scope of domestic military authority.

Moreover, the Court should be mindful that history has shown that expansions of government authority at the expense of individual rights are difficult to contain in times of national stress once ordinary constitutional constraints are relaxed. *See, e.g.*, David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 976, 990 (2002) (describing internment of Japanese citizens residing in the United States and American citizens of Japanese descent during World War II); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 318-20 (2004) (discussing Cold War excesses arising from fear of communist agents infiltrating U.S. government).

II. This Court Should Require Clear Congressional Authorization Before Considering Any Expansion Of The Enemy Combatant Exception.

Whether the present threat of global terrorism justifies modifying the traditional conception of an "enemy combatant" thus raises important constitutional questions that this Court may someday be required to resolve. But not today. Rather, the Court should defer a constitutional decision until Congress, in consultation with the President, has plainly considered the question itself and clearly authorized indefinite detention of individuals lawfully living in the United States and suspected of terrorism. Appling this clear statement rule not only avoids a potentially unnecessary constitutional decision, but also gives effect to the Constitution's division of wartime authority among the branches and allows the Court to fulfill its important constitutional role with the benefit of the wisdom, judgment, and experience of its coordinate branches on a question that requires the special expertise and competencies of all three departments of our government.

A. The Constitution Permits Domestic Military Detention Without Trial Only Upon The Concurrence Of All Three Branches Of Government.

This Court has never approved the military detention of individuals lawfully residing in the United States without legislative authorization. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion) (allowing congressionally-

approved detention of enemy combatants); *Ex Parte Quirin*, 317 U.S. 1, 41-42 (1942) (congressionally-authorized military trial of saboteurs caught within the United States); *Ludecke v. Watkins*, 335 U.S. 160, 161-62, 173 (1948) (detention of resident aliens only pursuant to specific congressional authorization). This is a reflection of the constitutional design.

1. The Founding Generation protected liberty not only through the enumeration of specific individual rights, but also through the separation of powers. *See, e.g., Boumediene v. Bush*, 128 S.Ct. 2244, 2246 (2008) (noting that "allocat[ing] powers among three independent branches . . . serves not only to make Government accountable but also to secure individual liberty"); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (explaining that the separation of powers "was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty"). Thus, among the "bedrock principles of our constitutional system" is the idea that "great power must be held in check and that the body that defines what conduct to outlaw, the body that prosecutes violators, and the body that adjudicates guilt and dispenses punishment should be three distinct entities." Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1259 (2002).

2. Multi-branch participation is as central to protecting liberty in wartime as it is in times of peace. Our Constitution "is a law for rulers and people, equally in war and in peace." *Ex parte Milligan*, 71 U.S. 2, 120 (1866). Most rights remain

in place in wartime,[7] and the fundamental structural protection against encroachment on liberty—the separation of powers—continues to govern.

The Constitution thus assigns Congress the power to "declare War," "raise and support Armies," regulate the military, and govern the capture of enemy property. U.S. CONST. art. I, § 8. And perhaps most importantly for this case, the Constitution gives Congress the authority to "define and punish . . . Offenses against the Law of Nations." *Id.* The Founders thus recognized the need to take into account general precepts of the international law of war as they continue to evolve and adapt to changing conditions. But they placed principal authority for deciding when and how to refine the definition of war crimes with Congress, not the President or the judiciary.

Accordingly, under our Constitution, many fundamental wartime decisions are made through a dialogue between Congress and the President, whose power to suggest and veto legislation ensures congressional consideration of his expert views as Commander-in-Chief. *See* U.S. CONST. art. I, § 7; WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 219 (2000) (the Constitution makes "clear that the President may do

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[7] The Constitution mentions only two rights expressly subject to abrogation during war: the Third Amendment's prohibition against the quartering of soldiers in private homes, U.S. CONST. amend. III, and the Suspension Clause's prohibition against suspending habeas rights except "in Cases of Rebellion or Invasion," U.S. CONST. art. I, § 9.

many things in carrying out a congressional directive that he may not be able to do on his own").

The legislative role is especially important when the government acts to infringe fundamental liberty interests. "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi*, 542 U.S. at 536 (plurality opinion); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645-46 (1952) (Jackson, J., concurring) (observing that although the President exercises substantial wartime authority when his war powers are "turned against the outside world," when those powers are "turned inward" the Constitution requires the involvement of Congress); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).[8] Thus, for example, the Founders explicitly provided for multi-branch participation in the punishment of wartime treason, assigning Congress the responsibility of defining the punishment, the President the duty of prosecution, and the judiciary the oversight of the trials. U.S. CONST. art. II, § 1, art. III, § 3. The Constitution further protected individual liberty by safeguarding access to the Great

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[8] Likewise, although the judiciary's role in the protection of individual liberty is much reduced when the President exercises powers abroad against those with no claim to the protection of our Constitution, *see Johnson v. Eisentrager*, 339 U.S. 763, 776 (1950), the courts play a critical role when the Executive acts to detain individuals within the territorial jurisdiction of the United States, *see Boumediene*, 128 S. Ct. at 2253-62.

Writ of Habeas Corpus, even in time of war, allowing its suspension only in "Cases of Rebellion or Invasion," U.S. CONST. art. I, § 9, and only as authorized by Congress, *see, e.g.*, *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) (recognizing that suspension of the writ requires congressional approval); *see also Hamdi*, 542 U.S. at 537 (plurality opinion) (same); *id.* at 562 (Scalia, J., dissenting) (same).

It should come as no surprise, then, that indefinite domestic detention of individuals without trial should require the concurrence of all three branches of government, each exercising its own special competencies. Thus, for example, in *Ex parte Endo*, 323 U.S. 283 (1944), this Court confronted the lawfulness of the internment of a loyal American citizen of Japanese descent during World War II. Although no one doubted the gravity of wartime risks faced by the nation, this Court nonetheless proceeded upon the assumption (apparently unchallenged by the President) that the detention required congressional approval. *See id.* at 298-99. And finding no such authorization in the relevant statutes, the Court held the detention unlawful and ordered Endo's release. *Id.* at 302-04. In a related context, the Court in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), held invalid a military order replacing the civilian courts of Hawaii with military tribunals during World War II, after concluding that the action, although approved by the President, *id.* at 308, was not authorized by Congress, *id.* at 324.

B. A Clear Statement Rule Ensures That Joint Participation Has Taken Place And Encourages Dialogue Between The Branches.

This Court should not find congressional approval of the indefinite detention of lawful U.S. residents suspected of terrorism-related offenses absent clear indication that Congress has directly considered and approved the practice.

Such a clear statement rule is consistent with this Court's prior practice in this area. In each of this nation's most recent major conflicts—World War II, the Cold War, and the war on terrorism—this Court has declined to approve substantial new incursions on individual rights in the absence of clear congressional authorization. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 601-02 (2006) (refusing to approve the trial by military commission of detainees at Guantanamo because of the lack of clear legislative authorization); *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (requiring clear evidence of congressional authorization of revocation of passports of suspected communists); *Ludecke*, 355 U.S. at 163-64 (approving the detention of citizens of enemy governments during World War II under the Alien Enemy Act because the Act's "terms, purpose, and construction le[ft] no doubt" about its authorization); *Duncan*, 327 U.S. at 324 (declining to read federal statute to permit military supplanting of civilian courts in Hawaii during World War II because of lack of clear legislative authorization); *Endo*, 323 U.S. at 299-300, 302 (finding no authorization for internment of loyal Japanese-American citizens during World

War II); *see also generally* Cass Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47.[9]

This traditional requirement of a plain statement promotes four important objectives.

First, requiring Congress to speak clearly will avoid a potentially unnecessary constitutional decision in an area in which the Court should be reluctant to act unnecessarily. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001); *Spector Motor Servc., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944).

Second, a clear statement rule reflects the constitutional presumption in favor of preserving individual liberty. "In interpreting a war-time measure we must assume that [Congress's] purpose was to allow for the greatest possible accommodation between [individual] liberties and the exigencies of war." *Endo*, 323 U.S. at 300. Thus, this Court has "assume[d], when asked to find implied powers in a grant of legislative . . . authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." *Id.*; *see also Coleman v. Tennessee*, 97 U.S. (7 Otto) 509, 514 (1878)

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[9] In other cases, like *Hamdi*, the Court has not required a clear statement when the government has employed a power consistent with established constitutional principles. *See Hamdi*, 542 U.S. at 521 (plurality opinion) (the AUMF authorizes detention that accords with "longstanding law-of-war principles"); *see also Hamdan*, 548 U.S. at 593 (explaining that the Court in *Quirin* found that a statute authorizing military commissions "simply preserved what power, under the Constitution and the common law of war, the President had had before 1916 to convene military commissions").

(explaining that given the "known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect"); *Duncan*, 327 U.S. at 317 (same). In the wartime context, such presumptions guard against the risk that the military might undervalue civilian liberty and that the "continual effort and alarm attendant on a state of continual danger" will lead to the erosion of civil rights. *See* THE FEDERALIST No. 8, at 61-62 (Alexander Hamilton) (Clinton Rossiter ed., 1961).[10]

Third, a clear statement rule enforces the constitutionally ordained separation of powers by insisting upon Congress's prerogative to decide whether, and how, to authorize the extraordinary measure of indefinite domestic military detention. In the criminal context, this Court narrowly construes penal statutes not only out of respect for individual liberty, but also in deference to Congress's exclusive authority to define the content of federal criminal law. *See, e.g.*, *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) (explaining that rule of lenity—which

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[10] The presumption in favor of liberty embodied in a clear statement rule is as central for cases involving lawful resident aliens as it is for cases involving citizens. *See, e.g.*, *St. Cyr*, 533 U.S. at 298-99 (requiring clear statement to withdraw habeas right from aliens); *Barber v. Gonzales*, 347 U.S. 637, 642-43 (1954) (holding that "deportation statutes . . . should be strictly construed"); *see also* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2084 (2007).

requires that criminal statutes "be construed strictly" —is founded in part "on the plain principle that the power of punishment is vested in the legislative, not in the judicial department"). The same should be true when courts construe statutes alleged to authorize deprivations of liberty outside the criminal justice system. Indeed, such vigilance is especially appropriate in times of conflict, when the perceived need for quick and decisive action may create a special risk of executive infringement on legislative authority. *Cf.* JACK GOLDSMITH, THE TERROR PRESIDENCY 126 (2007) (after terrorist attacks of September 11, 2001, the operating ethos for some in the executive branch has been to "push and push and push until some larger force makes us stop") (internal quotation marks omitted).

Fourth, a clear statement requirement can operate as an "interpretive rule [that] facilitates a dialogue between" the branches. *Boumediene*, 128 S. Ct. at 2243. By design, the legislative process is a collaborative endeavor between the legislative and executive departments, taking advantage of the strengths, and compensating for the weaknesses, of each branch. "Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking." *Loving v. United States*, 517 U.S. 748, 757-58 (1996). Thus, Congress is charged with legislative responsibilities precisely because it is the branch with the best claim to speak authoritatively on behalf of a large and diverse nation. And in balancing competing claims and interests—such as whether traditional criminal procedures are

ineffective to meet the modern threat—Congress can inform itself through factfinding procedures that are not available to the courts. *Cf. Bush v. Lucas*, 462 U.S. 367, 389 (1983).

At the same time, Congress may lack the depth of experience and expertise found in the executive branch, headed by a Commander-in-Chief charged with the day-to-day execution of the law and protection of the nation from the threat of global terrorism. Even without the threat of a presidential veto, U.S. CONST. art. I, § 7, the President's views on questions of national security inevitably garner deference.

Thus, requiring a clear statement ensures that tradeoffs between security and liberty are undertaken in the first instance through a "deliberative and reflective process engaging both of the political branches." *Hamdan*, 548 U.S. at 637 (Kennedy, J., concurring in part). It also helps ensure that the collaboration is, in fact, "informed," *see Boumediene*, 128 S. Ct. at 2243, by making certain that the particular sacrifices made in the name of public safety were directly considered. *See St. Cyr*, 533 U.S. at 299 n.10 ("'In traditionally sensitive areas, . . . the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'") (citation omitted). When authorization is found in broad and vague terms—when legislators are not required to "deliberate, argue, and take a stand," *see* GOLDSMITH, *supra*, at 207—there is an increased likelihood that the courts will unknowingly and unnecessarily

authorize broad powers Congress did not fully contemplate.

Of course, the concurrence of the legislative and executive branches cannot displace the courts' fundamental obligation to enforce the individual rights guaranteed by the Constitution. It may be that Congress and the President will be willing to sacrifice more liberty than the founding document will permit. But just as clear statement rules ensure that Congress has done its job, they assist the courts in doing theirs.

For one thing, requiring Congress to act with clarity in the first instance may diminish the practical difficulties in drawing constitutional lines in this uncharted area. Legislative lines can be drawn with a clarity that is difficult for courts to achieve and can be modified in light of experience and with changing conditions. For example, during the Civil War, after President Lincoln unilaterally suspended habeas corpus, the Congress legislatively authorized the suspension but "limited [that] authority in important respects." *See Milligan*, 71 U.S. at 133 (Chase, C.J., concurring in the judgment). So, too, in this case, were Congress to conclude that indefinite detention is appropriate in some cases involving alleged terrorists lawfully residing in the United States, it could well lay down limitations that would narrow the scope of this Court's eventual constitutional inquiry. Congress might, for example, provide statutory criteria for concluding that an individual is an enemy combatant and legislatively define the permissible duration of confinement. And Congress might also establish procedural safeguards sufficiently protective to avoid any serious procedural

due process concerns with the method for determining enemy combatant status.[11]

While such determinations would not bind this Court on the question of the statute's constitutionality, they would represent the considered judgment of two co-equal branches of government on questions to which their views are especially entitled to substantial respect. An inter-branch dialogue between the political branches and the judiciary could be especially helpful in this context, where the constitutional calculus necessarily involves a weighing of public necessity against private interests, both of values of the highest order. Without it, courts might, for example, underestimate military necessity or the special problems created by efforts to deal with an extraordinary kind of crime through ordinary criminal processes. Federal judges do not see daily threat briefings and "must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security." *Boumediene*, 128 S. Ct. at 2276–77. At the same time, courts pressed to pass on the constitutionality of measures instigated by the Executive alone may give undue deference to assertions of military authority precisely because they recognize their

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[11] In this case, there are serious questions as to the constitutional adequacy of the procedures adopted by the government for making enemy combatant determinations. *See* Pet. App. 117a-137a (Traxler, J., concurring in the judgment). While *amici* do not address the procedural due process questions in this brief, they do not wish to leave the impression that their silence indicates agreement with the United States' position on this question.

relative lack of expertise. Requiring the President to justify his requests for extraordinary authority to the people's elected representatives in Congress can guard against that risk as well.

There is no reason to believe that Congress will default in its responsibility to act with clarity. *See* Petr. Br. 36-45 (discussing enactment of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001)). Nor is there any reason to think that if this Court denies the Executive a power Congress intended to give it, and which the President believes essential to the security of our country, that the executive branch lacks the means or the will to "return[] to Congress to seek the authority he believes necessary." *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring).

III. The AUMF Does Not Clearly Authorize Military Detention Of Individuals Lawfully Within The United States On Suspicion of Terrorism.

In this case, the United States has identified only one statute, the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), which it believes authorizes the indefinite military detention of legal U.S. residents. But the AUMF does not authorize such detention with sufficient clarity, if at all. *See* Petr. Br. 28-48.

The AUMF authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . ." § 2(a), 115 Stat. at 224. Those words may

constitute sufficient congressional authorization for the Executive to detain traditional enemy combatants captured in Afghanistan. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion). But the AUMF does not even mention—let alone clearly authorize—an extension of that traditional authority to include the indefinite detention of individuals within the United States on suspicion of terrorism. *Cf. id.* at 547–548 (2004) (Souter, J., concurring) (finding AUMF did not clearly authorize detention even of citizens engaged in active combat with U.S. forces in Afghanistan); *id.* at 573–74 (Scalia, J., dissenting) (same); *see also* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2085 (2007) (concluding that the AUMF does not "provide[] the necessary statutory authorization for the indefinite detention of aliens apprehended within the United States").[12]

* * * * *

The conflict between our foundational commitment to individual liberty and preserving the nation's security in the face of new and terrible threats is one of the defining challenges of our times. Striking the proper balance will require all the wisdom and experience our country can bring to bear

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[12] Indeed, it is unlikely that Congress was able to give the question of domestic detention power significant thought—the AUMF was enacted one week after September 11, 2001, when the nation's attention was focused abroad, particularly on the prospect of war with Afghanistan.

on the problem. Denying the President the authority he seeks here will facilitate, not end, that necessary deliberative process. "Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so." *Hamdan*, 548 U.S. at 636 (Breyer, J., concurring).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI
Petitioner,

v.

COMMANDER DANIEL SPAGONE,
U.S.N., CONSOLIDATED NAVAL BRIG
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF WILLIAM N. ESKRIDGE, JR., DANIEL A. FARBER, AND ERIC LANE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors and scholars at Yale Law School, Boalt Hall Law School, and Hofstra Law School, respectively. They teach and write in the areas of legislation and statutory interpretation. Based on their application of accepted canons of statutory interpretation, *amici* respectfully submit that neither the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), nor the USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified at 8 U.S.C. § 1226a), authorizes the indefinite detention of Petitioner and similarly situated persons seized in the United States as enemy combatants.

SUMMARY OF ARGUMENT

In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), a plurality of this Court held that the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (the "AUMF"), authorized the President to detain as enemy combatants persons who were "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there." *Hamdi*, 542 U.S. at 516 (quotation marks omitted). In seeking to hold al-Marri in a naval brig indefinitely without charge, the

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

government now asks this Court to extend the plurality's decision in *Hamdi* and read into the AUMF the implicit authorization for the President to seize and detain U.S. citizens and resident aliens on American soil, even if they never affiliated with a foreign military or set foot on a foreign battlefield. Under settled principles of statutory interpretation, the government's breathtakingly expansive reading of the AUMF should be rejected.

Congress has specifically denied the President the indefinite detention powers that the government now seeks to gain through judicial interpretation. Just thirty-eight days after passing the AUMF, Congress passed the USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified at 8 U.S.C. § 1226a), which gave the President carefully defined powers to detain resident aliens on suspicion of terrorism. The administration initially sought much broader and unlimited detention power but was forced to withdraw that proposal in the face of bipartisan congressional disapproval. Congress's unambiguous rejection of the administration's request for authority to indefinitely detain persons seized within the United States fatally undermines the government's assertion that such detention was somehow authorized *sub silentio* by the AUMF only thirty-eight days earlier.

Having failed to convince Congress to grant the power to hold resident aliens in indefinite detention, the government now seeks to lobby the judiciary to read that authority into the more general provisions of the AUMF. The government's efforts to override the clear will of Congress in the guise of judicial

interpretation cannot be reconciled with *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), or our Constitution's separation of powers. "If civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of this Court." *Hamdi*, 542 U.S. at 578 (Scalia, J., dissenting).

Even if Congress had not specifically limited the President's powers to detain resident aliens, traditional canons of construction would counsel against the government's broad reading of the general terms of the AUMF. Under the canon of constitutional avoidance, this Court should avoid interpreting the AUMF in a manner that would raise difficult constitutional questions, both as applied to resident aliens such as al-Marri and as applied in future cases to U.S. citizens. And, under the clear-statement rule announced in *Ex parte Mitsuye Endo*, 323 U.S. 283 (1944), this Court should not interpret the general provisions of a wartime measure to restrict the domestic liberty of citizens unless such an intent is clearly and unmistakably expressed in the text of the statute. While the detention of persons fighting in a foreign theater of war may be implied from the general terms of the AUMF, *Endo* requires a clear and explicit statement to authorize the domestic seizure and detention of persons who never set foot on a foreign battlefield. Because the AUMF does not clearly and unmistakably authorize such detentions of citizens and resident aliens, the decision of the Fourth Circuit should be reversed.

ARGUMENT

The government asks this Court to extend the plurality's decision in *Hamdi* and read into the AUMF the implicit authorization for the President to seize U.S. citizens and resident aliens on American soil, and to hold those detainees indefinitely in military custody without charge. Under settled principles of statutory interpretation, the administration's expansive interpretation of the AUMF should be rejected.

I. The AUMF Did Not Authorize—and the Patriot Act Prohibits—the Indefinite Domestic Detention of al-Marri and Other Resident Aliens Seized Within the United States.

In arguing that the power to seize and detain persons in the United States should be viewed as "necessary and appropriate force" authorized by the AUMF, the government ignores the explicit and unambiguous restraints on executive detention that Congress enacted as part of the Patriot Act. The AUMF should not be interpreted to implicitly confer the same broad detention powers that Congress specifically refused to authorize.

A. The Plain Text of the Patriot Act Clearly and Explicitly Limits the Executive's Power To Detain Indefinitely a Resident Alien on Suspicion of Terrorism.

When it passed the Patriot Act (thirty-eight days after passing the AUMF) Congress gave the President explicit, narrowly defined authority to detain aliens within the United States on suspicion of terrorism. A subheading of the statute is

expressly identified as a "[l]imitation on indefinite detention." 8 U.S.C. § 1226a(a)(6).

The Patriot Act provides that within seven days of seizing an alien within the United States, the Attorney General "shall place the alien . . . in removal proceedings," or "shall charge the alien with a criminal offense." *Id.* § 1226a(a)(5). If no charges or removal proceedings are brought within that seven-day period, the Attorney General "shall release the alien." *Id.* The Patriot Act allows the Attorney General to detain suspected terrorists during the pendency of their removal proceedings and when it is impossible in the "reasonably foreseeable future" to transfer them to another country—but that additional detention power is subject to strict procedural safeguards. *Id.* § 1226a(a)(6). In such cases, the Attorney General or Deputy Attorney General must personally certify that release of the alien would pose national security concerns, and the responsibility for making that certification may not be delegated to any other official. *Id.* § 1226a(a)(4). Following the initial certification, "[t]he alien may request each 6 months in writing that the Attorney General reconsider the certification and may submit documents or other evidence in support of that request." *Id.* § 1226a(a)(7). Every six months, the Attorney General must submit detailed reports to the House and Senate Judiciary committees disclosing the number of aliens certified, the grounds for those certifications, the nationalities of the aliens, the length of the detention for each certified alien, the number of certified aliens who were removed, the number of certified aliens granted relief from

removal, the number of certified aliens the Attorney General has determined may no longer be certified, and the number of certified aliens released from detention. *Id.* § 1226a note.

Even if the text of the Patriot Act were not plain and unambiguous, the legislative history confirms Congress's clear intent to place strict limits on the President's power to detain aliens in the United States. In drafting the Patriot Act, Congress considered and rejected the President's request for authorization to detain suspected terrorists indefinitely without charge. The initial legislation proposed by the administration, named the Anti-Terrorism Act of 2001, would have allowed indefinite detention with no limitations or restrictions. During committee hearings in Congress, this proposal drew bipartisan criticism,[2] which caused the administration to agree to a more restricted provision. *See* Neil A. Lewis & Robert Pear, *A*

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[2] *See Administration's Draft Anti-Terrorism Act of 2001: Hearings Before the H. Comm. on the Judiciary*, 107th Cong. 14 (2001) (statement of Rep. Conyers) (identifying proposal for indefinite detention as one of a "number of provisions in your measure that give us constitutional trouble"); *id.* at 20 (statement of Rep. Berman) (criticizing provision for giving Attorney General "an ability to detain in perpetuity people in detention without limit, without requirement of deportation, without requirement of prosecution"); *id.* at 30 (statement of Rep. Lofgren) ("[T]he indefinite detention is a real issue, because there is no time line during which the deportation proceedings must be undertaken."); *Homeland Defense: Hearings before the S. Comm. on the Judiciary*, 107th Cong. 26 (2001) (statement of Sen. Specter) (criticizing proposal for giving "the authority to detain on that very generalized standard without any evidentiary base or probable cause").

Nation Challenged: Congress; Negotiators Back Scaled-Down Bill to Battle Terror, N.Y. Times, Oct. 2, 2001, at A1 ("The proposal for indefinite detention of immigrant suspects engendered the greatest opposition from civil libertarians both inside and outside Congress.")

Congress's repudiation of the administration's earlier proposal was recounted throughout the debate by supporters of the final bill. In the House, Representative Conyers submitted a "point-by-point" analysis of the legislation, stating that the final bill "completely revises the Administration's proposal to better balance the law enforcement needs of the Attorney General with the protection of aliens' civil liberties." 147 Cong. Rec. 20,441 (2001) (statement of Rep. Conyers); *see also id.* at 20,439 (statement of Rep. Sensenbrenner) (noting that the "compromise legislation" requires the Attorney General "to revisit every 6 months the detention of an alien who has been certified as an alien terrorist").

In the Senate, the bill's supporters emphasized that negotiators had "made painstaking efforts to achieve this workable compromise" in order to address "questions about earlier provisions, particularly the detention provision for suspected alien terrorists." 147 Cong. Rec. 19,507 (2001) (statement of Sen. Hatch).

> In response to the concern that the INS might detain a suspected terrorist indefinitely, the [sic] Senator Kennedy, Senator Kyl, and I worked out a compromise that limits the provision. It provides that the alien must be

> charged with an immigration or criminal violation within seven days after the commencement of detention or be released. In addition, contrary to what has been alleged, the certification itself is subject to judicial review. The Attorney General's power to detain a suspected terrorist under this bill is, then, not unfettered.

Id. Senator Kyl similarly stated that the provision for "temporary detention" was a "compromise" that "represents a bipartisan understanding." *Id.* at 19,538 (statement of Sen. Kyl).

> Under the compromise that Members have reached, the Attorney General must charge an alien with a deportable violation or he must release the alien. The underlying certification, and all collateral matters, can be reviewed by the U.S. District Court of the District of Columbia, and the Attorney General is required to report to Congress every six months on the use of this detention provision.

Id.

The legislative history of the Patriot Act underscores what is clear from the statute's plain text: The Executive may not detain a resident alien for more than seven days without bringing criminal charges or initiating deportation proceedings. Even after doing so, the Executive may further detain the alien only by following the Patriot Act's carefully outlined procedures. The government has not—and does not claim to have—followed any of these

procedures in detaining al-Marri in a naval brig for over five years.

B. The Patriot Act Precludes the Government's Expansive and Strained Reading of the AUMF.

Under settled principles of statutory interpretation, the Patriot Act's specific limitations on the detention of resident aliens preclude the government's interpretation of the AUMF as granting the President unlimited detention powers. A specific statute usually takes precedence over a general one. *See, e.g.*, *Hinck v. United States*, 127 S. Ct. 2011, 2015 (2007) (explaining that "a precisely drawn, detailed statute" usually "pre-empts more general remedies" and should be "regarded as exclusive") (quotation marks omitted). And later statutes usually trump earlier enactments. *See, e.g.*, *United States v. Estate of Romani*, 523 U.S. 517, 530 (1998) (applying principle that "a specific policy embodied in a later federal statute should control our construction" of an earlier statute). Accordingly, in the event of a conflict between the two statutes, the Patriot Act's specific and more recent limitations on executive detention would take precedence over any detention power that could be inferred from the broad provisions of the AUMF.

But in this case, the Court does not need to resort to such rules of construction to harmonize disparate pieces of legislation passed by different Congresses. The Patriot Act's specific limitations on the detention of resident aliens provide compelling evidence of what that same Congress did—and did not—intend

to authorize when it passed the AUMF thirty-eight days earlier. This Court has repeatedly refused to interpret broad legislative provisions in a manner that would conflict with other acts passed by the same Congress. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) ("It is quite unlikely that the same Congress that rejected proposals to limit the President's authority to conclude executive agreements [when enacting IEEPA] sought to accomplish that very purpose *sub silentio* through the FSIA.").[3]

It is similarly "quite unlikely" that the administration would request—and that Congress would explicitly withhold—the power to detain indefinitely resident aliens seized within the United States if the same Congress already had given those same detention powers to the President as part of the AUMF thirty-eight days earlier. Under settled

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[3] *See also Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002) (concluding that, in light of subsequent legislation requiring the Department of Education to centralize enforcement of FERPA, "[i]t is implausible to presume that the same Congress nonetheless intended private suits to be brought before thousands of federal- and state-court judges, which could only result in the sort of 'multiple interpretations' the Act explicitly sought to avoid"); *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 667 (1995) ("To interpret ERISA's pre-emption provision as broadly as respondents suggest, would have rendered the entire NHPRDA utterly nugatory, since it would have left States without the authority to do just what Congress was expressly trying to induce them to do by enacting the NHPRDA. Given that the NHPRDA was enacted after ERISA and by the same Congress, it just makes good sense to reject such an interpretation.").

principles of interpretation, the government's expansive reading of the AUMF should be rejected.

C. Judicial Interpretation of the AUMF Should Not Be Used To Override the Clearly Expressed Will of Congress.

Like a majority of the judges on the Fourth Circuit, the government asserts that the Patriot Act can simply be ignored because it does not directly speak to the conflict with al Qaeda. In its Brief in Opposition to Certiorari, the government echoes Judge Wilkinson's assertion that the two acts have "separate spheres" because "the AUMF represents a specific response to the 9/11 attacks, authorizing military force against those responsible for the attacks," while the Patriot Act's standards for executive detention are "designed to prevent terrorism generally, regardless of whether the suspect was associated with 9/11." Pet. App. 201a (Wilkinson, J.).[4]

The government's assertion that the detention provisions of the Patriot Act were not directed at the persons who planned the 9/11 attacks is demonstrably false. The administration presented the Patriot Act to Congress as "America's response to the criminal act of war perpetrated on the United States of America on September 11."

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[4] The government's Brief in Opposition does not discuss or defend Chief Judge Williams' assertion that the Patriot Act regulates the President's authority to detain under the Take Care Clause of the Constitution and the AUMF provides separate authority to detain pursuant to the Commander-in-Chief Clause. Pet. App. 169a.

Administration's Draft Anti-Terrorism Act of 2001: Hearings Before the H. Comm. on the Judiciary, 107th Cong. 3 (2001) (statement of John Ashcroft, Att'y Gen. of the United States). Indeed, then-Attorney General Ashcroft argued that the detention proposal was an important part of the administration's efforts to detect and apprehend persons responsible for the attacks: "[T]he investigation into the act of September 11 is ongoing, moving aggressively forward. To date, the FBI and INS have arrested or detained 352 individuals who remain—there are other individuals, 392 who remain at large, because we think they have—and we think they have information that could be helpful to the investigation." *Id.* at 7.[5]

In attempting to relegate the Patriot Act to a "separate sphere[]," the government asks the Court to infer grants of authority from the AUMF that could potentially supplant any and all domestic laws

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[5] Supporters of the administration's proposal similarly anticipated that the Patriot Act would be applied to apprehend and punish the perpetrators of the 9/11 attacks. *See id.* at 3 (statement of Rep. Sensenbrenner) ("Let me tell you on September 11, our common defense was penetrated, and America's tranquility, welfare and liberty were ruthlessly attacked. I urge the Members of this Committee to stand united together in recognition of the important purpose we must serve in preventing future terrorist attacks and prosecuting those who have already attacked us."); *id.* at 28-29 (statement of Rep. Chabot) ("[T]he vicious terrorist attacks of September 11 represented nothing less than a declaration of war against our country. To win this war, we must use every investigative law enforcement and military resource at our disposal to find and punish the individuals or governments responsible for these terrible crimes.").

unless, perhaps, the text of those laws specifically referenced the 9/11 attacks. That approach has no foundation in our Constitution's separation of powers or in this Court's precedents. Indeed, just a few terms ago, this Court affirmed that the general language of the AUMF does not supplant long-standing provisions of the Uniform Code of Military Justice governing military commissions. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring) (finding no authority in the AUMF to employ military commissions when "Congress has denied the President the legislative authority to create military commissions of the kind at issue here"); *see also* Daniel J. Freeman, Note, *The Canons of War*, 117 Yale L.J. 280, 304 (2007) (surveying cases and concluding that "in nine of twelve cases the courts found that a specific framework statute trumps a more recent AUMF").

The general rule that the AUMF does not automatically repeal pre-existing domestic laws applies with even greater force in this case because the Patriot Act was enacted one month *after* Congress passed the AUMF. This is not a case where an outdated statute failed to anticipate a new military emergency. Indeed, the same arguments that the government has used in litigation to justify the detention of al-Marri were considered and rejected by Congress during hearings on the Patriot Act. Witnesses testifying in favor of the administration's proposal argued that the detention of aliens was crucial to the country's ongoing war efforts against al Qaeda:

> Today we are right to presume the loyalty of our citizens but we still face the problem of enemy aliens in our midst. But because no foreign nation state is prosecuting the war against us, we cannot determine the identity of potentially alien enemies through the old category of the alien's nation state. Nevertheless these enemy aliens are even more dangerous because they, and not others from their home countries, are the main vectors of attacks on the United States. And unlike previous wars, they may have ready access to weapons of mass destruction targeted at civilians. In these circumstances, it is reasonable to provide the Attorney General with authority to find and detain the relatively few aliens who are our potential enemies. This new kind of alien detention authority is proportionate to the new kind of war we face.

Protecting Constitutional Freedoms in the Face of Terrorism: Hearings Before the Subcomm. on the Constitution, Federalism, and Property Rights of the S. Comm. on the Judiciary, 107th Cong. 25 (2001) (testimony of John O. McGinnis, Professor of Law, Benjamin N. Cardozo Sch. of Law). Having failed to convince Congress that indefinite detention powers were necessary for "the new kind of war we face," the administration now seeks to persuade the judiciary to authorize the same detention policies that Congress prohibited.

The government similarly argued in *Ex parte Milligan* that the danger of sleeper cells in Indiana

justified the domestic seizure and detention of Milligan, notwithstanding Congress's direction that all civilian detainees be promptly indicted or released. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 133-34 (1866) (Chase, C.J., concurring in part and dissenting in part). Indeed, the four Justices who concurred in judgment but dissented from *Milligan*'s constitutional holding were persuaded that the danger of enemy sleeper cells in Indiana might be serious enough to justify Milligan's detention as a constitutional matter. *Id.* at 140 (arguing that Milligan was a member of "a powerful secret association, composed of citizens and others . . . under military organization, conspiring against the draft, and plotting insurrection, the liberation of the prisoners of war at various depots, the seizure of the state and national arsenals, armed cooperation with the enemy, and war against the national government"). But, while dissenting from the majority's constitutional holding, those same Justices nevertheless recognized that their own assessment of whether such detention should be authorized could not supplant Congress's refusal to do so: "We have confined ourselves to the question of power. It was for Congress to determine the question of expediency. And Congress did determine it. That body did not see fit to authorize trials by military commission in Indiana, but by the strongest implication prohibited them." *Id.* at 141. The Justices accordingly concurred in the Court's unanimous holding that Milligan must be tried or released.

Nearly a century after *Milligan* this Court again reaffirmed in *Youngstown* that the courts should not second-guess the will of Congress based on the judges' own determination that "it may have been desirable to have given the President further authority, a freer hand" to respond to national security concerns: "The need for new legislation does not enact it." *Youngstown*, 343 U.S. at 603, 604 (Frankfurter, J., concurring); *cf. Hamdi*, 542 U.S. at 577-78 (Scalia, J., dissenting). Indeed, as in *Youngstown*, it would be particularly ironic for this Court to override the will of Congress as expressed in the Patriot Act in the guise of interpreting the general provisions of the AUMF:

> It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress.

Youngstown, 343 U.S. at 609 (Frankfurter, J., concurring).

The administration's request for expanded detention authority should be rejected in accordance with *Milligan* and *Youngstown*. Because Congress has explicitly refused to grant the administration the power to hold al-Marri and other resident aliens in indefinite detention, the AUMF may not be interpreted by judicial fiat to grant the authority that Congress refused to provide.

II. Other Canons of Construction Counsel Against an Interpretation of the AUMF that Would Authorize al-Marri's Detention.

Even if Congress had not specifically prohibited the President from holding resident aliens such as al-Marri in indefinite detention, traditional canons of construction would counsel against the government's expansive reading of the AUMF.

A. The Government's Broad Interpretation of the AUMF Raises Constitutional Concerns Both as Applied to al-Marri and as Applied to Citizens.

The indefinite detention without trial of a resident alien such as al-Marri raises serious concern. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *INS v. St. Cyr*, 533 U.S. 289, 304-05 (2001). This Court has long held that resident aliens are fully protected by the Fifth and Sixth Amendments. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("[E]ven aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law."). Moreover, resident aliens have a

substantive due process right to be free from bodily restraint that is "strong enough to raise a serious question as to whether, irrespective of the procedures used, the Constitution permits detention that is indefinite and potentially permanent." *Zadvydas*, 533 U.S. at 696 (citation omitted).

Those constitutional concerns are heightened in this case because the AUMF's implicit power to detain enemy combatants applies with equal force to citizens and non-citizens alike. The text of the AUMF makes no distinction between the detention of citizens and resident aliens. And this Court has twice held—first in *Quirin* and again in *Hamdi*—that, under the customary laws of war, the power to detain enemy combatants applies equally to both citizens and aliens. *See Ex parte Quirin*, 317 U.S. 1, 37-38 (1942); *Hamdi*, 542 U.S. at 519 (plurality opinion). The judges on the Fourth Circuit thus acknowledged—and the government agreed—that the court's holding would also authorize the President to seize and detain U.S. citizens on American soil. *See* Pet. App. 10a (opinion of Motz, J.); *id.* at 141a (opinion of Traxler, J.); *id.* at 146a n.2 (opinion of Gregory, J.); *id.* at 180a (opinion of Williams, C.J.); *id.* at 235a-236a (opinion of Wilkinson, J.). *But see id.* at 268a n.10 (opinion of Wilkinson, J.) (declining to "resolve the issue for the purposes of this case").

This Court should accordingly take care when interpreting the AUMF to avoid difficult constitutional questions that would arise, not only from the detention of al-Marri and other resident

aliens, but also from the detention of United States citizens in future cases.

> [W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—***whether or not those constitutional problems pertain to the particular litigant before the Court.***

Clark v. Martinez, 543 U.S. 371, 380-81 (2005) (emphasis added); *accord United States v. Santos*, 128 S. Ct. 2020, 2030 (2008) (plurality opinion); *Rita v. United States*, 127 S. Ct. 2456, 2478-79 (2007) (Scalia, J., concurring in the judgment).

The government's expansive interpretation of the AUMF would raise serious constitutional questions, in al-Marri's case and in future cases. This Court should not reach out to embrace those questions by reading into the AUMF a new detention authority that is not supported by, much less compelled by, the statute's plain text.

B. The AUMF Does Not Contain a Clear Statement Authorizing Domestic Detention, as Required By *Ex parte Endo*.

In *Ex parte Mitsuye Endo*, 323 U.S. 283 (1944), this Court held that "when asked to find implied powers" in "a war-time measure," a reviewing court must assume that "the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." *Id.* at 300; *accord Hamdi*, 542 U.S. at 544

(Souter, J., concurring in judgment) (explaining that *Endo* created "an interpretive regime that subjected enactments limiting liberty in wartime to the requirement of a clear statement").[6]

Endo's requirement of a "clear" and "unmistakable" statement is not simply a method of divining legislative intent. Rather, it "impute[s] to Congress an attitude that [i]s more consonant with our traditions of civil liberties." *Lee v. Madigan*, 358 U.S. 228, 235 (1959); *accord Duncan v. Kahanamoku*, 327 U.S. 304, 323-24 (1946) (narrowly construing congressional authorization of "martial law" in Hawaii and refusing to attribute to Congress an intent to "authorize the supplanting of courts by military tribunals"). Requiring a clear statement by Congress before finding executive power to detain citizens, or otherwise substantially infringe on their liberties, promotes respect for the constitutional system of checks and balances by demanding that the two political branches speak in unison. And, like the doctrine of constitutional avoidance, the *Endo* canon preserves a proper, and limited, role for the courts by avoiding difficult constitutional questions unless it is truly necessary to resolve them. "If the Court invokes a clear statement rule to advise that

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[6] *Endo*'s requirement of a clear statement authorizing detention was reaffirmed by Congress in the Non-Detention Act, 18 U.S.C. § 4001(a). Although al-Marri is not a citizen and therefore not covered by *Endo* or the Non-Detention Act, the judges on the court below recognized that their holding would apply with full force to citizens and non-citizens alike. The Court should therefore interpret the AUMF in a manner that avoids unnecessary conflict with *Endo* and the Non-Detention Act in similar cases involving citizens. *See supra* at 18-19.

certain statutory interpretations are favored in order to avoid constitutional difficulties, Congress can make an informed legislative choice either to amend the statute or to retain its existing text." *Boumediene v. Bush*, 128 S. Ct. 2229, 2243 (2008); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992).

The plurality opinion in *Hamdi* does not undermine *Endo*'s requirement of a clear statement to authorize the domestic seizure of civilians who have never fought on a foreign battlefield. The *Hamdi* plurality found the broad language in the AUMF to be sufficiently "clear[] and unmistakabl[e]" to authorize Hamdi's detention because the detention of battlefield captives is a "fundamental incident of waging war." *Hamdi*, 542 U.S. at 519. But *Hamdi* took care to distinguish its holding from the unlawful seizure and detention of Milligan at his home in Indiana. *See id.* at 521-22. The plurality opinion reflects this Court's historical willingness to accommodate a "latitude of interpretation" to uphold executive action "when turned against the outside world for the security of our society" but refuse "such indulgence" when executive action "is turned inward." *Youngstown*, 343 U.S. at 645 (Jackson, J., concurring).

Because the Fourth Circuit believed that "locus of capture" is "irrelevant," the lower court mistakenly concluded that the AUMF's implicit authorization for the President to detain battlefield captives necessarily authorizes the military detention of

citizens such as Jose Padilla who are seized in the United States, *Padilla v. Hanft*, 423 F.3d 386, 393 (4th Cir. 2005), and resident aliens such as al-Marri who never set foot on a foreign battlefield, Pet. App. 165a (opinion of Williams, C.J.) (applying *Padilla*'s holding to al-Marri).

The Fourth Circuit's assumption that the "locus of capture" is "irrelevant" is incorrect. It is one thing to read the AUMF as implicitly authorizing the kinds of detentions of enemy soldiers abroad that are normally a part of warfare. It is quite another to read the AUMF as implicitly authorizing the domestic seizure and detention of a person who is not a part of any military service and never fought on any battlefield. Indeed, this Court has historically been willing to infer military jurisdiction over foreign territories while refusing to infer any corresponding military jurisdiction over domestic territory without a clear statement. *See Lee*, 358 U.S. at 233-34 (narrowly construing military jurisdiction over crimes committed by soldier in the United States); *Duncan*, 327 U.S. at 313-14 (narrowly construing Congress's authorization of "martial law" in Hawaii). Interpreting the AUMF to authorize indefinite detention of persons seized on American soil would pose a significantly greater threat to domestic liberty then the detention of persons fighting overseas on a foreign battlefield. *Endo* counsels against inferring such restrictions on domestic liberty from the general provisions of a statute without a clear statement from Congress.

Congress must speak with greater clarity when it intends to authorize domestic detentions than when

it authorizes the detention of enemy soldiers captured abroad. Because the AUMF does not contain a clear and unmistakable statement authorizing the seizure and indefinite detention of citizens and resident aliens, al-Marri's petition should be granted and the Fourth Circuit's decision should be reversed.

CONCLUSION

For the foregoing reasons, the decision of the Fourth Circuit should be reversed.

Respectfully submitted,

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ALI SALEH KAHLAH AL-MARRI,

Petitioner,

TO BE REPRINTED

v.

DANIEL SPAGONE, U.S.N.,
CONSOLIDATED NAVAL BRIG,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR *AMICI CURIAE* EXPERTS IN THE LAW OF WAR

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici curiae are scholars and other experts in the field of international humanitarian law, also commonly referred to as the "law of war" or the "law of armed conflict." Their interest in this case stems from deeply held concerns about the Court of Appeals' interpretation and application of the law of war. *Amici* view it as imperative that this Court have before it a comprehensive explanation of the manner in which the law of war applies—and does not apply—to Petitioner's case.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* and their counsel made a monetary contribution intended to fund the brief's preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

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SUMMARY OF ARGUMENT

Whatever domestic law may have to say about the military detention of Petitioner Ali Saleh Kahlah al-Marri, there is no clearly established law-of-war principle that furnishes affirmative, independent authorization for that detention.

As a threshold matter, the law of war applies only in and to situations of *armed conflict*—either of an international character or of a non-international character. Petitioner plainly is not being detained incident to a war between nations; if any "armed conflict" exists between the United States and al Qaeda in the United States, it must be a *non*-international one. But the definition of "armed conflict" in the non-international context, though fact-bound and debatable at the margins, is not infinitely malleable. The state of affairs in Peoria, Illinois (or even the United States more broadly) at the time Petitioner was first detained as an "enemy combatant" falls well outside even the outer boundaries of that definition.

But even if Petitioner's detention *were* incident to a non-international "armed conflict," there is no law-of-war rule that would furnish affirmative authorization for that detention. The law-of-war rules governing non-international armed conflicts guarantee minimal humanitarian protections during detentions related to the conflict, but they do not in any way *authorize* the detention of someone in Petitioner's situation. Authorization, if any, must instead be found in domestic law.

Finally, even if international humanitarian law furnished affirmative authorization for detention incident to the classic non-international armed conflict (*i.e.*, the civil war), that authorization could not extend to Petitioner's detention. The "global war" against al Qaeda is a novel beast—one that can be claimed to reach every corner of the globe, that is defined

not by territory or by the existence of actual hostilities but by the presence of suspected terrorists, and that has no discernable ending point. Given the unprecedented nature of the conflict, and, hence, the unprecedented circumstances of the detention at issue, the well-established law of war cannot be understood to authorize that detention—much less recognize it as a "fundamental and accepted . . . incident to war." *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion).

ARGUMENT

To support its indefinite military detention of Petitioner Ali Saleh Kahlah al-Marri, the Government has relied on the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (the "AUMF"), which it views as having activated the President's war powers. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 594, 629-31 (2006) (assuming, without deciding, "that the AUMF activated the President's war powers" at least in connection with the armed conflict between al Qaeda and the United States in Afghanistan).

The AUMF does not explicitly mention detention. Nonetheless, a plurality of this Court held in *Hamdi v. Rumsfeld* that the statute must be understood to authorize the detention of "enemy combatants" in the international armed conflict between the United States and the Taliban government forces in Afghanistan—individuals who were "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there." 542 U.S. at 510, 516 (quotation marks omitted). The plurality explained that the absence of explicit legislative authorization was no barrier to detention of individuals falling within this "limited category" for the duration of the "particular conflict" in which they were captured because such detention was "so fundamental and accepted an incident to war as to be an

exercise of the 'necessary and appropriate force' Congress [through the AUMF] has authorized the President to use." *Id.* at 518; *see also id.* at 519 ("In light of [established law-of-war] principles, it is of no moment that the AUMF does not use specific language of detention. . . . Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.").

In reaching this conclusion, the *Hamdi* plurality was careful to distinguish the case there at hand, in which "a clearly established principle of the law of war" could properly be treated as incorporated by reference into the AUMF, from a situation in which "the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war," in which case the AUMF might well not be viewed as furnishing detention authority. *Id.* at 520, 521. In other words, the AUMF authorizes only what established law-of-war principles clearly and unmistakably authorize; to view it as authorizing more would be highly problematic, especially as applied to individuals (like Yaser Hamdi and Petitioner here) who unquestionably are entitled to the protections of the U.S. Constitution.

The circumstances of the military detention at issue in this case differ in crucial respects from those surrounding the detention of Yaser Hamdi. Petitioner here is not alleged ever to have taken up arms against the United States in Afghanistan—or indeed in any theater of active hostilities. He is being detained not in connection with the international armed conflict against the Taliban government forces that took place in Afghanistan, or with any other armed conflict on any recognizable battlefield, but rather in connection with the so-called "global war" against al Qaeda. As discussed below, there is no law-of-war principle –much less a well-established one—that furnishes independent authorization

for his military detention in such circumstances. Any such authorization, if it exists, must come from domestic law.

I. PETITIONER WAS NOT DETAINED IN A THEATER OF "ARMED CONFLICT" AND IS NOT ALLEGED TO HAVE PARTICIPATED IN AN "ARMED CONFLICT."

The law of war—also known as the laws of war, the law of armed conflict, and international humanitarian law ("IHL")—is the body of law that regulates the methods and means of waging armed conflict and stipulates the protections due to those caught up in armed conflict. *See* U.S. Dep't of the Army, Field Manual 27-10, *The Law of Land Warfare* ¶¶ 2-3 (1956) ("*The Law of Land Warfare*"). It consists of treaties—principally, the Hague Conventions[2] and the four 1949 Geneva Conventions[3]—and customary international law. *See The Law of Land Warfare* ¶ 4.[4]

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[2] *See, e.g.*, Hague Convention (IV) on Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2301.

[3] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Third Geneva Convention"); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. There are two Articles common to all four Conventions and discussed herein: Articles 2 and 3 (referred to below as "Common Article 2" and "Common Article 3").

[4] *The Law of Land Warfare* "is an official publication of the United States Army." Originally published in 1956, it is still regarded as an authoritative statement of the law of war, and although it lacks

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Putting aside for the moment the *content* of this law, its *scope* is circumscribed by a critical predicate requirement for its application: the existence of an "armed conflict." This is an important limitation, and one on which IHL furnishes concrete guidance. *See* Allen S. Weiner, Hamdan, *Terror, War*, 11 Lewis & Clark L. Rev. 997, 1017 (2007) ("'War' and 'armed conflict' are concepts with defined legal meanings.").

A. The Two Types of "Armed Conflict"

There are two kinds of armed conflict recognized under IHL: international armed conflict and non-international armed conflict. As discussed below, the law-of-war rules applicable to, the tests for identifying the existence of, and the scope of these two types of armed conflict differ in important respects.

1. International Armed Conflict

The first kind of armed conflict, which has long been the subject of international regulation, is an *international* armed conflict—an "armed conflict . . . between two or more of the High Contracting Parties." Common Article 2. This resort to armed force between nations is the principal subject of the Geneva Conventions' extensive regulations, which provide, for example, particularized requirements for the detention and treatment of "prisoners of war" captured during hostilities. *See, e.g.*, Third Geneva Convention, arts. 12-16 (general protections, including humane treatment); arts. 17-20 (protections afforded immediately upon capture); arts. 21-57 (particularized protections regarding conditions of internment); arts. 58-68 (provisions regarding prisoners'

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binding legal force, its provisions are "of evidentiary value insofar as they bear upon questions of custom and practice." *Law of Land Warfare* ¶ 1.

financial resources); arts. 69-78 (rules regarding prisoners' relations with the outside world). International armed conflicts are also subject to the terms of an instrument commonly referred to as Additional Protocol I[5]—a treaty that the United States has not ratified, but much of which the United States has long recognized as having the status of customary international law. *See* Int'l & Operational Law Dep't, The Judge Advocate General's Legal Center & School, U.S. Army, *Law of War Workshop Deskbook* 32 (Brian J. Bill ed., 2000) ("*Law of War Workshop Deskbook*"); Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. J. Int'l L. & Pol'y 419, 420 (1987) (remarks of former Deputy Legal Advisor to the U.S. Department of State).

The term "armed conflict" is not expressly defined in the Geneva Conventions or in any other law-of-war treaty. The circumstances in which an *international* armed conflict can be said to exist are, however, explained as follows in the authoritative commentary to the Conventions:

> *Any difference arising between two States and leading to the intervention of members of the armed forces* is an armed conflict within the meaning of [Common] Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces . . . .

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[5] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

Int'l Comm. of the Red Cross, *Commentary to the Geneva Convention Relative to the Treatment of Prisoners of War* 23 (1960) ("*Commentary on Third Geneva Convention*") (emphasis added) (footnote omitted). This is a straightforward, somewhat formal test that sets a relatively low threshold meant to maximize international regulation in the arena of *inter-state* conflict.

2. Non-International Armed Conflict

The other kind of "armed conflict" recognized by IHL is a conflict "not of an international character." Common Article 3. As evidenced by the phrase in Common Article 3 describing such a conflict as "occurring in the territory of one of" the parties to the Geneva Conventions, the drafters of the Conventions likely understood this class of conflict to consist largely of civil wars. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 629 (2006) (acknowledging that "the official commentaries accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of 'conflict not of an international character,' *i.e.*, a civil war"). This Court has concluded, however, that the category described is much broader—that it encompasses all "armed conflicts" that cannot be classified as "conflict[s] between nations." *Id.*

Unlike international armed conflicts, non-international armed conflicts are not subject to extensive regulation under the Geneva Conventions. Only Common Article 3 applies by its terms to these armed conflicts. That Article specifies certain "minimum" standards governing the treatment and trial of "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by . . . detention." *See Hamdan*, 548 U.S. at 629 (discussing Common Article 3).

Common Article 3 represented the first concerted—albeit very limited—effort to formulate international standards for the conduct of armed conflict other than between nation states. Until 1949, the conduct of armed conflict between a nation state and a non-state group, or between non-state groups, within the territory of a sovereign state, was generally viewed as a matter of exclusively domestic concern—at least insofar as the law of war was concerned. *See* Lindsay Moir, *The Law of Internal Armed Conflict* 19-21 (2002) ("*Internal Armed Conflict*"). A residue of this understanding is reflected in the drafting history of Common Article 3: Although it was originally proposed that *all* provisions of the Geneva Conventions be made applicable to non-international conflicts, that proposal was rejected on the basis that it impinged too heavily on nation-states' sovereignty. *See Commentary on Third Geneva Convention* 33.[6]

The trigger for the existence of "armed conflict" under Common Article 3—"armed conflict not of an international character"—is somewhat less formal and more closely tied

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[6] Additional international regulation of a limited subset of non-international armed conflicts was introduced in 1977 in the form of the instrument commonly known as Additional Protocol II. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609; *see also Law of War Workshop Deskbook*, 32 (noting that Additional Protocol II, like Additional Protocol I, largely has the status of customary international law in the United States). Additional Protocol II applies only to those non-international armed conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." Additional Protocol II, art. 1(1).

to particular geography than that for international armed conflict. *See, e.g.*, *HH & Others v. Sec'y of State for the Home Dep't*, Somalia CG [2008] UKAIT 00022, ¶ 321 (United Kingdom: Asylum & Immigration Tribunal) (noting that an international armed conflict is "usually easier to establish" than a non-international one). After all, if mere "intervention of the armed forces" sufficed to trigger application of the law of war to a conflict not between nations, *see Commentary on Third Geneva Convention* 23, a vast array of domestic deployments would become subject to the law of war, making them at once fair game for international regulation and potential excuses for displacement of normal domestic law. That result is not contemplated by IHL, which excludes "internal disturbances and tensions" and "isolated and sporadic acts of violence" from the definition of "armed conflict." Additional Protocol II, art. 1(2). *See also* Int'l Comm. of the Red Cross, *Commentary to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 36 (1960) (listing non-exclusive criteria for identification of non-international armed conflict and observing that such "criteria are useful as a means of distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection"); Comm. on the Use of Force, Int'l Law Ass'n, *Initial Report on the Meaning of Armed Conflict in Int'l Law* 11-12 (2008) ("*ILA Report*"), *available at* http://www.ila-hq.org/en/committees/index.cfm/cid/1022 (follow "Conference Report Rio 2008 (206kb)" hyperlink).

The definition of "armed conflict" in the non-international context is based upon two minimum criteria: that the groups using armed force be relatively well-organized, and that the hostilities be sufficiently intense. These two criteria are clearly reflected in the influential jurisprudence of the United Nations International Criminal Tribunal for the Former Yugoslavia ("ICTY"). In the seminal *Tadić* case, the ICTY Appeals Chamber stated that "armed conflict exists

whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (ICTY Appeals Chamber Oct. 2, 1995) ¶ 70; *see also, e.g.*, *Prosecutor v. Haradinaj*, Case No. IT-4-84-T, Judgment, ¶ 38 (ICTY Trial Chamber Apr. 3, 2008) (explaining that the test for whether there is an "armed conflict" triggering the law of war in a non-international context rests on "whether (i) the armed violence is protracted and (ii) the parties to the conflict are organized," and distinguishing "armed conflict" from "banditry, riots, isolated acts of terrorism, or similar situations").[7] The use of the word "protracted" in this definition has since been clarified, with the Appeals Chamber explaining that it is intended to exclude, for example, cases of civil unrest and single acts of terrorism, and is properly regarded as a measure of *intensity*; even a days-long campaign can qualify as sufficiently "protracted" if it involves intense exchanges of firepower. *See Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgment, ¶¶ 333-41 (ICTY Appeals Chamber Dec. 17, 2004); *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 17 (ICTY Appeals Chamber June 16, 2004); *see also Haradinaj*, *supra*, ¶¶ 40-49 (surveying ICTY jurisprudence

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[7] The ICTY's definition of "armed conflict" in the non-international context has gained broad acceptance. *See, e.g.*, Moir, *Internal Armed Conflict* 42-45; Natasha Balendra, *Defining Armed Conflict*, 29 Cardozo L. Rev. 2461, 2475 (2008) (describing *Tadić* as "perhaps the most frequently cited decision on what constitutes an armed conflict"); *ILA Report* 13 ("The ICTY *Tadić* decision is nowadays widely relied on as authoritative for the meaning of armed conflict in both international and non-international armed conflicts … [and] focused on two aspects of a conflict: the intensity of the conflict and the organization of the parties to conflict.").

on existence of "armed conflict"). Among the factors relevant to gauging intensity are the "[l]ength or protracted nature of the conflict and seriousness and increase in armed clashes"; the "[s]pread of clashes over the territory" in which the armed conflict is alleged to have occurred; the number of forces deployed to the territory; and the size and force of the weapons used. *See Milošević*, ¶¶ 28-31.

B. Petitioner Is Not Alleged to Have Been Involved in, nor Was He Detained During, Any "Armed Conflict" in the United States.

Applying the above-described criteria for the existence of the two kinds of "armed conflict," it is clear as an initial matter that Petitioner has not been detained incident to an *international* armed conflict. *Cf. Hamdan*, 548 U.S. at 628-29 (noting Government's argument that the armed conflict with al Qaeda—as opposed to the Taliban government forces—in Afghanistan was not an international armed conflict because it was not between nations). Petitioner, a citizen of Qatar, is not alleged to belong to or to have fought alongside the armed forces of any enemy nation. *See Al Marri v. Pucciarelli*, 534 F.3d 213, 231 (4th Cir. 2008) (en banc) (Motz, J., concurring in the judgment) ("[U]nlike Hamdi and Padilla, al-Marri is not alleged to have been part of a Taliban unit [and] not alleged to have stood alongside the Taliban or the armed forces of any other enemy nation . . . ."); *cf.* Common Article 2 (stating that the full panoply of Geneva Conventions' provisions apply to "armed conflict . . . between two or more of the High Contracting Parties"); *Ex parte Quirin*, 317 U.S. 1, 30-31 (1942) (holding that "combatants" fighting on behalf of an enemy nation in an international armed conflict could be subject to trial by military commission if they violated the laws of war). The only other form of armed conflict to which Petitioner's detention might be incident is a *non*-international armed conflict.

Application of the *Tadić* test for existence of a non-international armed conflict may be debated at the outer edges—for example, where the hostilities are not at all "protracted" in the usual sense of the term. Some have argued, for instance, that the events of September 11, 2001 qualified not just as an "armed attack" triggering the right to engage in self-defense under Article 51 of the Charter of the United Nations[8] but as a full-fledged "armed conflict." *See, e.g.*, Derek Jinks, *September 11 and the Laws of War*, 28 Yale J. Int'l L. 1, 33-38 (2003). *But see, e.g.*, Mary Ellen O'Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror?*, 43 Colum. J. of Transnat'l L. 435, 452-56 (2005); Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 Yale J. Int'l L. 325, 326-28 (2003); Reservation by the United Kingdom to Article 1.4 and Article 96.3 of Additional Protocol II, *reprinted in Documents on the Laws of War* 510 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) ("[T]he term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation.").

But Petitioner here is not detained in connection with the September 11 attacks (in which he is not alleged to have participated), nor is he alleged to have taken part in any armed conflict in, for example, Afghanistan. He is instead alleged to have taken part in acts in preparation for an unrealized terrorist attack at some undetermined point. To suggest that there was a non-international "armed conflict" in Peoria, Illinois, or even in the United States generally,

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[8] *See* Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 Stan. L. Rev. 415, 430 (2006). *But see* Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 Wash. U. Global Stud. L. Rev. 135, 144 n.30 (2004).

years after the September 11 attacks, when Petitioner was first detained as an "enemy combatant" (on June 23, 2003), stretches the concept of "armed conflict" beyond its breaking point. There were no acts of hostilities, much less intense or sustained hostilities, occurring in this country at the time.[9] *Cf. Prosecutor v. Kunarac*, Case No. IT-96-23-A & IT-96-23/1-A, Judgment, ¶ 58 (ICTY Appeals Chamber June 12, 2002) ("What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment—the armed conflict—in which it is committed.").

The only escape from the legal import of these undeniable facts is in a claim that the existence of a non-international armed conflict *somewhere* in the world necessarily triggers application of the laws of war *everywhere*—or at least everywhere a suspected al Qaeda terrorist might be found. That is, to say the least, a novel proposition as far as the law of war is concerned.[10] As discussed above, the existence of a

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[9] There is some uncertainty in IHL concerning the territorial application of the law of war once an armed conflict has been found to exist. The ICTY has at times suggested that the law of war would apply only within the "zone of hostilities" within a state, but at others suggested that the law of war would apply to the entire territory of the state in which an armed conflict is found. *Compare, e.g., Kordić and Čerkez, supra*, ¶ 341 (finding existence of armed conflict in "Central Bosnia"); *Milošević, supra*, ¶ 29 (finding existence of armed conflict in Kosovo region), *with Tadić, supra*, ¶ 70 (suggesting armed conflict is deemed to exist in "whole territory" of the state). This uncertainty is of no moment here, where there cannot be said to have existed an armed conflict in *any* part of the United States at the relevant time.

[10] It is also inconsistent with the approach that other countries around the world have taken in response to al Qaeda's terrorist acts—for example, in London and Madrid. *See* Mary Ellen O'Connell, *When is a War not a War? The Myth of the Global War on Terror*, 12 ILSA J. of Int'l & Comp. L. 535, 538 (2006).

non-international "armed conflict" is determined by facts on the ground in the territory in which the purported fighter (or, as is often the case in the ICTY jurisprudence, the purported war criminal) is alleged to have operated. *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121-22 (1866) (observing that, in state where petitioner resided (Indiana), the facts on the ground were not such as to justify resort to military procedures);[11] *see also* Mary Ellen O'Connell, *Combatants and the Combat Zone,* 43 U. Rich. L. Rev. 101, 118-119 (2009), *available at* http://ssrn.com/abstract=1332096.

This Court has recognized the need for some nexus between the relevant "armed conflict" and the law-of-war powers being exercised, particularly in the detention context. In *Hamdi*, the plurality concluded that the purpose of detaining "combatants" (a term of art discussed further below) in international armed conflicts is to prevent return to the *battlefield*, *i.e.*, the zone of hostilities. *Hamdi*, 542 U.S. at 518 (plurality opinion) ("The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again."); *see also Rasul v. Bush*, 542 U.S. 466, 488 (2004) (opinion of Kennedy, J.) (referencing detention in connection with the "zone of hostilities"); International Military Tribunal at Nuremberg, Judgment and Sentences, HMSO cmd 6964 (Oct. 1, 1946) p. 48, *reprinted in* 41 Am. J. of Int'l L. 229 (1947) (approving

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[11] As noted in *Milligan*, the existence of armed conflict at a particular time in a particular territory is what necessitates and constitutionally justifies the resort to the law of war. *See Milligan*, 71 U.S. at 127 ("If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course.").

the "principle[] of general international law on the treatment of prisoners of war" that "war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war").[12] Detention as "combatants" of individuals who are not members of the armed forces of a nation state or who have never even been in a zone of hostilities cannot of course be justified on these grounds.

For all of these reasons, to the extent the Government here claims to draw its authority from well-settled IHL principles, the fact that by its own terms IHL does not apply to situations like that of Petitioner is fatal to that claim.[13]

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[12] This is not to say that the detention itself must be at or near the battlefield. In *Hamdi*, the petitioner was being detained in the United States to prevent his return to the battlefield in Afghanistan. By contrast, here, Petitioner is being detained in the United States yet is not alleged ever to have been on any identifiable battlefield.

[13] The Government's own actions, moreover, belie the existence of any supposed "war" within the United States at or around the time of Petitioner's detention. Of those individuals resident in the United States at the time of their arrest, *no one* other than Petitioner has been subject to military detention based solely on allegations of suspected terrorism plans, absent any allegation of prior engagement in active hostilities outside the United States. As discussed above, Yaser Hamdi was alleged to have taken up arms against the United States as part of a Taliban unit in Afghanistan. Another individual, José Padilla, was subjected to military detention based in part on allegations of having taken up arms against the United States alongside the Taliban in Afghanistan, and was later transferred to civilian custody before this Court could review the legality of his military detention. *See Padilla v. Hanft*, 432 F.3d 582, 583 (4th Cir. 2005), *rev'd in part*, 546 U.S. 1084 (2006), *and cert. denied*, 547 U.S. 1062 (2006) (Kennedy, J., concurring). Numerous others—including some not even captured in the United States—have been prosecuted criminally in the United States. *See, e.g.*, Neil A. Lewis,

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II. EVEN IF THE LAW OF WAR APPLIES HERE, IT DOES NOT FURNISH INDEPENDENT AUTHORIZATION FOR PETITIONER'S DETENTION.

There is another reason why any resort to IHL by the Government in this case must fail: Even if the Government may properly invoke the law of war in relation to aspects of the "global war" against al Qaeda that do not fall within the parameters of what traditionally has been considered non-international "armed conflict," that law cannot be said to include affirmative authorization for Petitioner's detention.

A. The Law of War Does Not Furnish Affirmative Authorization for Detention Incident to a Non-International Armed Conflict.

As discussed above, if Petitioner is being detained incident to any "armed conflict," it must be a non-international armed conflict—a conflict governed not by the full panoply of provisions set forth in the bulk of the Geneva Conventions, but by the "Convention in miniature" that is Common Article 3. This is a critical point. As reflected in the plurality decision in *Hamdi*, IHL supplies definite authority for the detention as "combatants" of individuals fighting on behalf of an enemy nation. *See* 542 U.S. at 518;

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Moussaoui Given Life Term by Jury Over Link to 9/11, N.Y. Times, May 4, 2006, at A1; Pam Belluck, *Unrepentant Shoe Bomber Is Given a Life Sentence for Trying to Blow Up Jet*, N.Y. Times, Jan. 31, 2003, at A13; Katharine Q. Seelye, *Regretful Lindh Gets 20 Years in Taliban Case*, N.Y. Times, Oct. 5, 2002, at A1; *see generally* Richard B. Zabel & James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism in the Federal Courts* (2008) (white paper for Human Rights First), *available at* http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf.

see also Third Geneva Convention, art. 21 ("The Detaining Power may subject prisoners of war to internment."); Gabor Rona, *An Appraisal of U.S. Practice Relating to "Enemy Combatants,"* 10 Y.B. of Int'l Humanitarian L. 232, 240-41 (2009) ("In international armed conflicts, the Geneva Conventions have long supplied a clearly defined and established legal framework for detention."), *available at* http://papers.ssrn.com/so13/papers.sfm?abstract_id=1326551. Such authorization makes sense in the context of inter-state conflict, which often is conducted outside the territory of the power seeking to prevent the return of fighters to the battlefield, far from the arena of domestic laws and institutions. *See, e.g., id.* at 240-41; John Cerone, *Jurisdiction and Power: The Intersection of Human Rights Law and the Law of Non-International Armed Conflict*, 40 Isr. L. Rev. 396, 402 (2007).

By contrast, because non-international armed conflicts (paradigmatically, civil wars) historically have been conducted wholly within the territory of the only party to the conflict that could—from the sovereign state's perspective, at least—be *authorized* to detain enemy fighters, there has been no need on the state's part to resort to international law to justify detention and no desire to permit its invocation by rebels or insurgents. In the absence of any felt need, and in deference to the sovereign prerogatives of nation-states, therefore, IHL has left detention authorization to domestic law in non-international armed conflicts. *See, e.g.*, John Cerone, *Misplaced Reliance on the "Law of War,"* 14 New Eng. J. Int'l & Comp. L. 57, 66 (2007) ("As the central case of non-international armed conflict is an internal conflict, [detention] authorization is unnecessary. Of course the state is free to detain insurgents operating within its territory."); Marco Sassòli, *Query: Is There a Status of "Unlawful Combatant?"*, 80 Int'l L. Stud. 57, 64 (2006) ("In [non-international armed conflicts], IHL cannot possibly be seen as providing a sufficient legal basis for detaining anyone.");

Jenny S. Martinez, *Availability of U.S. Court to Review Decision to Hold U.S. Citizen as Enemy Combatant*, 98 Am. J. Int'l L. 782, 787 (2004) (observing that IHL does not provide the "independent authority for detention of individuals" in non-international armed conflicts that it does in international armed conflicts).

IHL's silence on this front is closely linked to its traditional silence concerning the status of fighters in non-international armed conflict. The Government here seeks to detain Petitioner as an "enemy combatant." The term "combatant," however, is generally regarded as a term of art in the law governing *international* armed conflict—a term used to describe a member of the armed forces (or group under a command responsible to the armed forces) of a warring nation, one who is privileged to use lethal force against others but also a legitimate target of opposing lethal force. *See, e.g.*, Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 Int'l Rev. Red Cross 45, 45-47 (2003); *Quirin*, 317 U.S. at 45 (distinguishing status of "combatants" in international armed conflict, and their amenability to trial for violations of the law of war, from the petitioner in *Ex Parte Milligan*, 4 Wall. 2, on the basis that Milligan was not "a part of or associated with the armed forces" of an enemy government).[14] It

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[14] *Quirin* was decided in 1942, seven years before the Geneva Conventions. Nonetheless, the Court's use of the term "combatant" in that case is generally consistent with the term's current use: A "combatant" is a soldier in the armed forces of an enemy nation with combat privileges (a "lawful combatant," or an "enemy combatant"). *See Quirin*, 317 U.S. at 31. A combatant, according to *Quirin*, may become an "unlawful combatant" if he or she engages in war crimes—"acts which render [his or her] belligerency unlawful." *Id.* In *Quirin* itself, the petitioners were alleged to have committed the war crime of perfidy by shedding their uniforms before crossing military lines, to give the impression of being civilians. *See id.*

denotes privileges and immunities as well as vulnerabilities. Because states whose armed forces are engaged in armed conflict against non-state groups typically are loath to enhance the status of rebels or insurgents or to afford them the combatant's immunity from punishment for killing, IHL has not imported the term "combatant," or the privileges it entails, into the non-international armed conflict context. *See* Dörmann, *supra*, at 47 ("The law applicable in non-international armed conflicts does not foresee a combatant's privilege (i.e. the right to participate in hostilities and impunity for lawful acts of hostility)."). Fighters in non-international armed conflict are not automatically entitled to prisoner-of-war immunities under the laws of war but would potentially be subject to criminal prosecution pursuant to domestic law. And "[i]t is logical that, since civilian, non-international armed conflict fighters gain no status in international law, and since there is no conflict between two or more sovereigns, the IHL of non-international armed conflict should be silent, in deference to national law, on questions of detention." Rona, *supra*, at 241; *see also* Sassòli, *supra*, at 64 ("The international humanitarian law applicable to non-international armed conflicts does not provide for combatant or prisoner of war status, contains no other rules on the status of persons detained in connection with the conflict, nor details the circumstances under which civilians may be detained.").

Where a person has directly participated in hostilities, it could not be said that that the law of war would *prohibit* his detention incident to a non-international armed conflict, or even that it is entirely silent about detention in such a conflict. To the contrary, Common Article 3 affords certain humanitarian protections to those detained, as does article 5 of Additional Protocol II (insofar as it applies), which lists a number of provisions governing treatment of "[p]ersons whose liberty has been restricted." But neither treaty

furnishes independent *authorization* for the detention of any defined class of people.

Finally, it should be emphasized that this particular case does not present occasion to consider whether the authorization for detention found under the rules governing international armed conflict should, by virtue of similar military exigency, apply to detentions in aspects of the "war on terror" that involve "armed conflicts" in foreign territory, whether or not of an international character. The features of this case—the domestic detention of a U.S. resident suspected of planning to engage in domestic terrorist acts—bear much closer relation in important respects to the circumstances of a classic internal conflict than they do to a classic war between nation-states in which the detaining power is operating outside its own territory.

B. IHL Plainly Does Not Furnish Authority for the Military Detention of Petitioner.

Even if the case could be made that IHL furnished some independent authority to detain "fighters" in non-international armed conflict, that authority could not extend to Petitioner here. The circumstances of Petitioner's military detention are, as far as *amici* are aware, utterly unprecedented in the law of war.

As discussed above, it is clear there were no active hostilities in Peoria, Illinois or in the territory of the United States generally at the time of Petitioner's designation and detention as an "enemy combatant." It is likewise clear that Petitioner is not alleged to have directed any of his purported actions or plans toward any theater of war, to have directly participated in any armed hostilities, or to have participated in any aspect of the "global war on terror" that IHL would view as rising to the level of "armed conflict." He manifestly is not a battlefield detainee.

As noted above, the law governing non-international armed conflict originally was developed principally to address the problems posed by civil wars and other armed conflicts confined to the territory of a single state, not transnational conflicts. Even assuming that the "global war" against al Qaeda in its entirety qualifies as an "armed conflict," and assuming further that the existence of that conflict triggers application of *some* of the laws of war, it cannot trigger the battlefield detention authority recognized in *Hamdi*. Such authority, even when applicable, is inextricably intertwined with involvement in actual hostilities. The *Hamdi* plurality recognized as much; in finding authority for the detention in that case, the plurality stated that its holding stemmed from an "understanding . . . based on longstanding law-of-war principles"—an understanding that might "unravel" "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war." *Hamdi*, 542 U.S. at 521.

CONCLUSION

For all of the foregoing reasons, *amici curiae* support Petitioner's request that this Court reverse the decision of the Court of Appeals.

Respectfully submitted,

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In the Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,

Petitioner,

v.

COMMANDER DANIEL SPAGONE, U.S.N., CONSOLIDATED NAVAL BRIG,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF FORMER FEDERAL JUDGES AND FORMER SENIOR JUSTICE DEPARTMENT OFFICIALS IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are 14 former federal judges (one of whom was the Director of the FBI), 2 former Attorneys General, and 12 other former senior officials in the United States Department of Justice. Please see the attached Appendix for a list of the *amici*, along with biographical information for each one. *Amici* are interested in this case because of their years of dedicated service to the United States and their commitment to the Constitution and the rule of law. *Amici* are gravely concerned about the Fourth Circuit's decision in this case, which permits the government to seize and indefinitely imprison anyone in this country, citizens and non-citizens alike, without the procedural protections provided in criminal prosecutions.

The Fourth Circuit's decision rests on the premise that the "war on terror" justifies deviation from settled principles of due process, and that the Executive Branch should be permitted to arrest within the United States and to detain indefinitely without charge or trial, anyone—even a legal alien or United States citizen—whom it alleges to be an "enemy combatant." We emphatically reject that premise. Those who plan terrorist acts should be tried and, if guilty as charged, convicted in a court of law. Indeed, in many cases in recent years, the criminal justice system has been used to effectively prosecute people accused of committing or planning

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

to commit acts of terrorism within the United States. Based on their many years of experience, *amici* are knowledgeable about the tools prosecutors possess, the ability of the federal courts to handle cases involving classified evidence, and the effectiveness of the criminal justice system to prosecute alleged terrorists and protect American citizens.

SUMMARY OF ARGUMENT

In this extraordinary case, the Fourth Circuit has held that the government has the power to arrest and imprison indefinitely anyone in the United States — including American citizens — whom the government suspects of being a potential terrorist, without the normal procedural protections found in the criminal justice system. This unprecedented expansion of Executive authority within the borders of the United States is not only at odds with more than 200 years of history, but it is wholly unnecessary. The United States criminal justice system is well equipped to prosecute and imprison people who plan or commit terrorist acts; in recent years, the United States has successfully prosecuted many terrorists in the federal courts. In addition, the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3 §§ 1-16, and the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1801 et seq., provide effective tools that courts have used to handle terrorism prosecutions and the foreign intelligence and classified information often present in such cases.

It is essential that this Court reverse the Fourth Circuit's decision, which permits the government to forgo the criminal process and instead implement a regime of indefinite Executive detention. As long as that ruling stands, it will be a grave threat to the

civil liberties of American citizens, an omnipresent cudgel that may be wielded by the Executive Branch at its discretion against anyone suspected of posing a potential threat.

ARGUMENT

THE CRIMINAL JUSTICE SYSTEM IS WELL EQUIPPED TO PROSECUTE PEOPLE ACCUSED OF PLANNING OR COMMITTING TERRORIST ACTS.

This case raises fundamental issues concerning the power of the Executive Branch. The Fourth Circuit has held that the government has the power to arrest and imprison indefinitely anyone in the United States whom the government suspects of being a potential terrorist, without the normal procedural protections found in the criminal justice system. (In this case, for example, al-Marri was held *incommunicado* for 16 months without access to his attorneys after the government dismissed the criminal charges against him and decided to detain him as an "enemy combatant" instead. Pet. 4.) Moreover, the unprecedented power granted to the government by the Fourth Circuit's decision applies not only to non-citizens seized in this country, but to American citizens as well. We are gravely concerned that the Fourth Circuit's decision gives the government unfettered discretion to avoid criminal prosecutions and the protections associated with them, such as the defendant's right to counsel, the right to hear all of the evidence offered against him, the right to confront witnesses, and the government's obligation to prove guilt beyond a reasonable doubt.

Moreover, we are concerned with the appearance in this case that the government may have subjected

al-Marri to indefinite military detention in order to interrogate him outside the "strictures of criminal process." Pet. App. 54a n.19 (Motz, J., concurring in the judgment) ("The Government's recent admission in other litigation that it has subjected al-Marri to repeated interrogation during his imprisonment in the Naval Brig would seem to substantiate al-Marri's contention" that he is being detained indefinitely for interrogation outside the criminal justice system). As Justice O'Connor wrote for the plurality in *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004), "indefinite detention for the purpose of interrogation is not authorized." See also *Rumsfeld v. Padilla*, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting) (executive detention is not "justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure . . . . For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny").

The Fourth Circuit's decision is especially troubling because the animating force underlying it—the notion that indefinite executive detention is the only means of preventing alleged terrorist activity—is demonstrably false. Congress has enacted a wide variety of statutes that may be used to effectively prosecute suspected terrorists. See, *e.g.*, 18 U.S.C. § 2384 (conspiring to overthrow, make war or oppose by force the government of the United States); 18 U.S.C. § 2339A (criminalizing the provision of "material support or resources" to terrorist organizations for carrying out a number of specified offenses, including murder, kidnapping and the violation of various anti-terrorism statutes); 18 U.S.C. § 2339B (criminalizing knowingly providing

material support for foreign terrorist organizations, but not requiring intent that the support be used in furtherance of terrorist activity); 18 U.S.C. § 2339C (prohibiting conduct that "directly or indirectly" provides funds with the knowledge that the funds will be used to carry out terrorist activities); 18 U.S.C. § 2339D (making it a crime to receive military-type training from an organization that the Secretary of State has designated a foreign terrorist organization); 18 U.S.C. § 2332b (criminalizing "acts of terrorism transcending national boundaries").[2] As discussed in Section D *infra*, there are also a variety of other federal statutes that the government has used to prosecute and imprison persons suspected of terrorist-related activity.

In addition, CIPA and FISA provide effective tools for the investigation and prosecution of those suspected of planning or committing terrorist acts. FISA allows the government to lawfully conduct electronic surveillance and physical searches to gather foreign intelligence. CIPA establishes procedures to handle classified information that might be used during a criminal trial.

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[2] For defendants charged with terrorism-related offenses, there is a statutory presumption that the defendant will be detained before trial. 18 U.S.C. § 3142. To overcome that presumption, defendants must show that they do not pose a risk to the community or a flight risk. Order of Detention, *United States v. al-Moayad*, No. 03-cr-01322 (E.D.N.Y. Nov. 17, 2003) (Dkt. No. 6), *cited in* Richard B. Zabel & James J. Benjamin, Jr., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN FEDERAL COURTS 85 (May 2008). For example, in the Embassy bombing cases, defendant El-Hage was detained thirty-three months before his trial. *United States v. El-Hage*, 213 F.3d 74, 81 (2d Cir. 2000).

A. The Criminal Justice System Has Repeatedly Proven Its Effectiveness In Prosecuting Alleged Terrorists.

The criminal justice system has repeatedly demonstrated its ability to prosecute terrorism crimes, including the following cases:

1. In a series of related cases, 17 individuals were convicted of planning and executing the 1993 bombing of the World Trade Center, conspiring to bomb United States commercial airliners in Southeast Asia, and engaging in a seditious conspiracy "to wage a war of urban terrorism against the United States and forcibly to oppose its authority." *United States v. Rahman*, 189 F.3d 88, 104 (2d Cir. 1999); see also *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003); *United States v. Salameh*, 152 F.3d 88 (2d Cir. 1998) (all affirming convictions). Among the offenses for which the *Rahman* defendants were convicted were seditious conspiracy, attempted bombing, a variety of firearms charges, and several counts of murder, attempted murder and conspiracy to commit murder (including the attempted murder of Egyptian President Hosni Mubarak and the murder of Rabbi Meir Kahane). *Rahman*, 189 F.3d at 104.

2. Iyman Faris was charged with, and ultimately pleaded guilty to, conspiring with other members of al Qaeda to destroy the Brooklyn Bridge. *United States v. Faris*, 162 F. App'x 199 (4th Cir. 2005) (affirming Faris's conviction and 20-year sentence).

3. Seven young men dubbed the "Portland Seven" were apprehended in 2002 and charged with various counts of conspiracy; one fled the country for Afghanistan, where he was killed in battle, while the

other six pleaded guilty and received prison sentences. Mitch Frank, *Terror Goes on Trial*, TIME, Mar. 7, 2005, at 34; Jack Epstein & Johnny Miller, *The Record in Court of U.S. Charges Brought Against Terrorism Suspects by the Justice Department*, S.F. CHRONICLE, Sept. 17, 2004, at A3.

4. Six men from New York State who came to be known as "The Lackawanna Six" were charged with providing material assistance to a terrorist organization after they traveled to Afghanistan to train at an Al Qaeda training camp where they met with Osama bin Laden. All six defendants entered guilty pleas and were sentenced to prison terms. John J. Goldman, *First "Lackawanna Six" Sentencing*, L.A. TIMES, Dec. 4, 2003, at A20; John J. Goldman, *Last of the "Lackawanna Six" Terror Defendants Sentenced*, L.A. TIMES, Dec. 18, 2003, at A38.

5. On December 22, 2001, Richard Reid was arrested for trying to destroy an airplane with explosives embedded in his shoes. He later pleaded guilty to various terrorism-related offenses including: attempted use of a weapon of mass destruction, 18 U.S.C. § 2332a(a)(1); placing an explosive device on board an aircraft and interfering with an airline flight crew and attendants, 49 U.S.C. § 46504; and attempted destruction of an aircraft, 18 U.S.C. § 32(a). *United States v. Reid*, 369 F.3d 619, 619 n.1 (1st Cir. 2004). He was sentenced to life in prison. *Id.* at 619-620.

6. United States citizen John Walker Lindh was apprehended in Afghanistan and ultimately pleaded guilty to charges that included assisting al Qaeda and carrying explosive devices. He received a 20-

year sentence. *United States v. Lindh*, 227 F. Supp. 2d 565 (E.D. Va. 2002).

7. In 2006, the government indicted seven suspected terrorists, including the group's leader, Narseal Batiste, who were arrested in Florida for allegedly plotting to destroy the Sears Tower. *United States v. Batiste*, 2007 U.S. Dist. Lexis 61186 (S.D. Fla. Aug. 21, 2007). They have been charged with violating 18 U.S.C. §§ 2339B (providing material support to terrorists), 2339A (providing material support or resources to designated foreign terrorist organizations), 844(n) (conspiracy to import, manufacture, distribute and store explosive materials), and 2384 (treason, sedition and subversive activities). *Id.* One of the defendants was acquitted and now faces deportation to Haiti. Luis F. Perez, *Cleared Man May Be Deported*, SUN-SENTINEL, Aug. 25, 2008, at 6B. A third trial is set for the remaining defendants after two mistrials. Vanessa Blum, *Third Liberty City Trial Set for January; New Lawyers Get Time To Prepare*, SUN-SENTINEL, May 1, 2008, at 2B. As of the time of this filing, jury selection had begun. *Jury selection begins in Florida terror retrial*, ASSOCIATED PRESS, Jan. 27, 2009.

8. Ahmed Omar Abu Ali was arrested in Saudi Arabia and transferred to the United States, where he was prosecuted for joining al Qaeda and participating in plans to commit terrorist acts within the United States. *United States v. Abu Ali*, 395 F. Supp. 2d 338, 341 (E.D. Va. 2005). He was sentenced to 30 years' imprisonment after being convicted of nine counts, including providing material support and resources to a designated foreign terrorist organization in violation of 18 U.S.C. § 2339B,

conspiracy to provide material support to terrorists in violation of 18 U.S.C. § 2339A, and receiving funds and services from al Qaeda in violation of 50 U.S.C. § 1705(b). *United States v. Abu Ali*, 2006 U.S. Dist. Lexis 29461, at *2 n.1, *20 (E.D. Va. Apr. 17, 2006). The Fourth Circuit recently affirmed his conviction and remanded to the district court for resentencing on the ground that the district court's significant downward departure from the sentencing guidelines was unjustified. *United States v. Abu Ali*, 528 F.3d 210, 269 (4th Cir. 2008), petition for cert. filed (Oct. 6, 2008) (No. 08-464).

9. Ali al-Timimi, an Islamic scholar and alleged member of the Virginia Jihad network, who encouraged young men to travel to foreign training camps and join the Taliban to fight the United States, was sentenced to life in prison after a jury convicted him of conspiracy, attempting to aid the Taliban, soliciting treason, soliciting others to wage war against the United States, and aiding and abetting the use of firearms and explosives. Eric Lichtblau, *Scholar Is Given Life Sentence in 'Virginia Jihad' Case*, N.Y. TIMES, July 14, 2005, at A21.

10. Rafiq Sabir, a doctor living in Florida, and Tarik Shah were charged with conspiring to provide martial arts training and medical assistance to al-Qaeda in violation of 18 U.S.C. § 2339B. Sabir was convicted and sentenced to 25 years in prison following a five-week jury trial. *United States v. Sabir*, 2007 U.S. Dist. Lexis 77952 (S.D.N.Y. Oct. 15, 2007). Shah pleaded guilty to all charges and was sentenced to 15 years in prison on November 7, 2007. Press Release, U.S. Atty's Office S.D.N.Y., Bronx Martial Arts Instructor Sentenced to 15 Years in

Prison for Conspiring to Provide Material Support to Al-Qaeda (Nov. 7, 2007).

11. Al-Qaeda member Christopher Paul met repeatedly with terrorist leaders in Pakistan and Afghanistan over the course of 15 years and received weapons training from them. *United States v. Paul*, No. 2:07-cr-00087-GLF (S.D. Ohio June 6, 2008). The Ohio resident pleaded guilty in June 2008 to conspiracy to use weapons of mass destruction against European and United States targets, and was sentenced to 20 years in prison. *Id.*

12. Yassin Aref and Mohammed Hossain, two Albany mosque leaders, were convicted of a money laundering conspiracy to provide material support to a terrorist organization in a case involving a scheme to use a missile in an attack on New York City. The Second Circuit recently affirmed their convictions and held that the district court properly sealed certain classified documents in their trials. *United States v. Aref*, 533 F.3d 72, 83 (2d Cir. 2008), petitions for cert. filed (Dec. 8, 2008) (Nos. 08-7650, 08-7651).

13. In March 2008, a jury found a former member of the United States Navy, Hassan Abu-Jihaad, guilty of providing material support to terrorists and disclosing classified national defense information as part of a conspiracy to kill United States citizens. Press Release, U.S. Atty's Office D. Conn., Jury Finds Former Member of U.S. Navy Guilty of Terrorism and Espionage Charges (Mar. 5, 2008).

14. On November 24, 2008, the Second Circuit affirmed the convictions of Mohamed Sadeek Odeh, Mohamed Rashed Daoud Al-'Owhali, and Wadih El-

Hage for their involvement in the 1998 bombings of the American embassies in Kenya and Tanzania. *United States v. Odeh*, 548 F.3d 276 (2d Cir. 2008). In doing so, the court held that the district court's reliance on CIPA to restrict access to classified information to individuals with security clearance did not violate El-Hage's constitutional rights. *Id.*

15. On December 22, 2008, a jury convicted five defendants for conspiracy to kill U.S. soldiers at Fort Dix in a jihadist plot. Paul von Zielbauer, *5 Men Are Convicted in Plot on Fort Dix*, N.Y. TIMES, Dec. 22, 2008. The defendants potentially face life imprisonment.

16. Ahmed Abdellatif Sherif Mohamed received a 15-year sentence after pleading guilty to providing material support to a terrorist organization in violation of 18 U.S.C. § 2339A for possessing bomb making material and posting an instruction video on remote bomb detonation on YouTube. Mitch Stacy, *Egyptian student gets 15 years in Fla. terror case*, ASSOCIATED PRESS, Dec. 18, 2008; see also Dep't of Justice Press Release, *available at* http://www.usdoj.gov/opa/pr/2008/December/08-nsd-1127.html.

17. Uzair Paracha was sentenced to 30 years' imprisonment after being convicted of various terrorism-related charges for trying to obtain immigration documents for an al Qaeda member and safeguarding al Qaeda assets. *United States v. Paracha*, 2006 WL 12768 (S.D.N.Y. Jan. 3, 2006), *aff'd*, 2008 WL 2477392 (2d Cir. June 19, 2008).

B. CIPA Equips Courts To Effectively Manage Classified Material In Terrorism Prosecutions.

The Classified Information Procedures Act is an important statutory tool that provides sound procedures for courts to effectively manage classified information at issue in terrorism prosecutions. The criminal justice system's record of effectively handling classified information without security breaches reinforces the conclusion that our criminal justice system is more than able to deal with terrorism prosecutions.

CIPA contains the following central features:

- The government may seek a protective order to prevent disclosure of classified information provided to a defendant in a trial. 18 U.S.C. app. 3 § 3.
- The defendant must provide the court and government with written notice that he intends to use classified information. 18 U.S.C. app. 3 § 5.
- The court is authorized to determine the relevance and admissibility of all classified information, including any classified information requested by the defendant. 18 U.S.C. app. 3 §§ 4 & 6(a). The government may request a hearing for the court to make such a determination; that hearing may be held *in camera* upon a proper showing that a public hearing would disclose the classified information. *Id.* § 6(a).
- The statute also provides alternative procedures the court may use for addressing

classified information where the court authorizes its disclosure, such as redacting classified portions of documents or allowing for a substitution such as a statement admitting the relevant facts or a summary of the classified information. 18 U.S.C. app. 3 § 6(c)(1). In response to a court's decision to authorize disclosure of classified information (or its substitute), the Attorney General may submit an affidavit "certifying that disclosure of classified information would cause identifiable damage to the national security of the United States. If so requested by the United States, the court shall examine such affidavit *in camera* and *ex parte*." *Id.* § 6(c)(2). The court may also seal or close the proceedings. *Id.* § 6(d) & (f).

- CIPA provides for immediate appeal of the district court's decisions regarding the admission or exclusion of classified information. 18 U.S.C. app. 3 § 7.

- Section 8 provides procedures to deal with classified information at trial, such as admitting only a portion of documents or evidence and taking further precautions with the witnesses' testimony to avoid disclosure of classified information. 18 U.S.C. app. 3 § 8.

CIPA has been an effective tool in terrorism prosecutions. It enables courts to protect national security interests, while at the same time establishing fair procedures that permit the prosecution of persons accused of planning or committing terrorist acts. Judges with CIPA experience "speak of it as a reasonable compromise

between fairness and security." Kenneth Roth, *After Guantanamo: The Case Against Preventative Detention*, FOREIGN AFFAIRS, May/June 2008, at 9. Judge Coughenour, who presided over the Millennium Bomber trial in 2001, noted that CIPA "played a prominent role during the trial," and that "the act's extensive protections [were] more than adequate." John C. Coughenour, *The Right Place to Try Terrorism Cases*, WASH. POST, July 27, 2008, at B7. Indeed, a recent study concludes that "CIPA has provided a flexible, practical mechanism for problems posed by classified evidence," citing at least eighteen terrorism cases where CIPA has been employed successfully. Richard B. Zabel & James J. Benjamin, Jr., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN FEDERAL COURTS 85 (May 2008). See also, *e.g.*, *Abu Ali*, 528 F.3d at 250-255 (affirming convictions for terrorism-related offenses and explaining in detail how the district court "appropriately balanced" the interests of the government in protecting national security interests and the defendant's right to a fair trial).[3]

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[3] In his opinion below, Judge Wilkinson cited two instances of alleged disclosures to support his view that our criminal justice system is not up to the task of prosecuting those accused of terrorism without creating a dangerous security risk. Pet. App. 214a-219a (Wilkinson, J., concurring in part, dissenting in part) (citing Michael B. Mukasey, *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, at A15). First, Judge Wilkinson referenced the prosecution of Omar Adel Rahman, in which the government's list of unindicted co-conspirators was turned over to the defendant and reportedly reached Osama bin Laden in Khartoum shortly thereafter; second, Judge Wilkinson referred to testimony given during the trial of Ramzi Yousef, the mastermind of the 1993 World

Indeed, Patrick Fitzgerald, the prosecutor in the case arising out of the bombings of the American embassies in Tanzania and Kenya, has commented that "[w]hen you see how much classified information was involved in that case, and when you see that there weren't any leaks, you get pretty darn confident that the federal courts are capable of handling these prosecutions. I don't think people realize how well our system can work in protecting classified information." SERRIN TURNER & STEPHEN J. SCHULHOFER, THE SECRECY PROBLEM IN TERRORISM TRIALS 25 (Brennan Ctr. For Justice 2005) (quoting a November 29, 2004 consultation with Patrick Fitzgerald).

Trade Center bombings, that allegedly helped terrorists discover that one of their communications links had been compromised.

In both cases, however, the government apparently did *not* invoke CIPA to limit access to the evidence. IN PURSUIT OF JUSTICE, at 88-89. With respect to the list of co-conspirators in Rahman's trial, the government evidently did not invoke CIPA to prevent disclosure of the list; in other cases since then, including the Embassy Bombings case, the government *has* successfully invoked CIPA to prevent disclosure of sensitive information. *Id.* at 88 (citing the protective order issued in *United States v. El-Hage*, No. 98-cr-001023 (S.D.N.Y. Dec. 17, 1998) (Dkt. 27)). With respect to the second example, publicly available information cannot confirm the incident, but again the trial record does not indicate that the government invoked CIPA to prevent disclosure of the testimony that Judge Wilkinson referenced. *Id.* at 88. Far from illustrating the inadequacies of CIPA, these examples highlight the importance of invoking the statute's protections more fully.

C. Evidence The Government Obtains Through FISA Surveillance May Be Admitted Without Compromising Sensitive Information.

The admissibility of evidence obtained through surveillance under the Foreign Intelligence Surveillance Act, and the Executive's ability to introduce surveillance-derived evidence without compromising its sources and methods, have further enhanced the government's ability to successfully prosecute suspected terrorists in the criminal justice system.

FISA was originally enacted in 1978 to permit the government to conduct lawful electronic searches for the purpose of gathering foreign intelligence within the United States without satisfying the Fourth Amendment's criminal probable cause requirements. IN PURSUIT OF JUSTICE, at 77. [4] Under the 1978 statutory scheme, the government had to show that the "primary purpose" of the interception was for obtaining foreign intelligence. 50 U.S.C. § 1804. In 2001, Congress amended FISA in the USA Patriot Act, Pub. L. 107-56, § 1004, 115 Stat. 272 (2001), making it easier for the government to meet its burden to obtain FISA surveillance and to use information discovered in that surveillance in

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[4] Congress amended FISA in 1994 to expand its reach to physical searches. Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, 108 Stat. 3443 (1994). In 1998, Congress amended the statute to create modified procedures for obtaining pen registers and to authorize the Executive Branch to access business records for foreign intelligence and international terrorism investigations. See 50 U.S.C. §§ 1861-1862.

criminal prosecutions. For example, the Patriot Act changed the government's burden from having to show that the "primary purpose" was to obtain international intelligence to show only that "a significant purpose" of the interception was to obtain international intelligence. 50 U.S.C. § 1804(a)(6)(B). In addition, Congress explicitly allowed federal officers who obtained foreign intelligence information to "consult with Federal law enforcement officers to coordinate efforts to investigate or protect against" attack or other acts of terrorism. 50 U.S.C. § 1806(k)(1).

Moreover, FISA allows the special Foreign Intelligence Surveillance Court ("FISC"), which meets *ex parte* and in secret, to authorize electronic surveillance and physical searches.[5] A FISA order is based on probable cause that the target is a foreign power or an agent of a foreign power. 50 U.S.C. § 1805(a).

Material obtained under FISA may be admitted in criminal trials. See *United States v. Wen*, 477 F.3d 896, 897 (7th Cir. 2006) (Easterbrook, J.) (citing *In re Sealed Case*, 310 F.3d 717 (F.I.S. Ct. Rev. 2002)). As the FISA review court explained in *In re Sealed Case*, "Congress did not impose any restrictions on the government's use of the foreign intelligence information to prosecute agents of foreign powers for foreign intelligence crimes." 310

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[5] The Justice Department submitted 2,181 FISA applications in 2006—double the number submitted in 2001. Of those applications, the FISC rejected only one. See IN PURSUIT OF JUSTICE, at 81 (citing Letter from Richard A. Hertling, Acting Assistant Att'y Gen., to Hon. Nancy Pelosi (Apr. 27, 2007)).

F.3d at 725. Thus, the government is able to use FISA evidence in terrorism prosecutions. See, *e.g.*, *United States v. Holy Land Found. for Relief & Dev.*, 2007 U.S. Dist. LEXIS 50239, at *12-13, *26 (N.D. Tex. July 11, 2007) (denying defendants' motions to compel production of the FISA application and to suppress non-privileged evidence obtained from the FISA surveillance); *United States v. Holy Land Found. for Relief & Dev.*, 2007 U.S. Dist. LEXIS 48616, at *8-9 (N.D. Tex. July 5, 2007) (denying defendants' motion to declassify all communications obtained via FISA); *United States v. Paul*, No. 07-cr-00087 (S.D. Ohio Apr. 23, 2007) (Dkt. 19) (government's notice that it would use evidence obtained through electronic and physical FISA surveillances; the defendant pleaded guilty in June 2008, see Dkt. 59 & 60); *United States v. al-Arian*, 267 F. Supp. 2d 1258, 1260 (M.D. Fla. 2003) (trial evidence was to include 21,000 hours of telephone recordings in Arabic obtained under FISA; defendant later pleaded guilty). Moreover, 50 U.S.C. § 1806(f) provides that FISA materials, in specified circumstances, shall be reviewed by the court *ex parte* and *in camera* to determine whether the FISA surveillance was lawfully authorized and conducted.

D. The Government Possesses Other Lawful Means By Which It Also May Prosecute And Imprison Persons Suspected Of Terrorism.

In addition to statutes aimed specifically at terrorist-related activity, the government has a variety of other lawful means by which it may prosecute and imprison suspected terrorists and thus thwart terrorist activity in its nascent stages.

For example, the Department of Justice has prosecuted suspected terrorists for fraudulently obtaining travel documents (18 U.S.C. § 1546); for immigration violations (18 U.S.C. § 1425); for making misrepresentations to federal investigators (18 U.S.C. § 1001); and for use of a false social security number (42 U.S.C. § 408(a)(7)(B)). See U.S. Dep't of Justice, *2006 Counterterrorism White Paper*, at 29-30, *available at* http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf; see also IN PURSUIT OF JUSTICE, at 51-54; Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 430-433 (2007). The government has also prosecuted suspected terrorists under the criminal solicitation statute, 18 U.S.C. § 373, see, *e.g.*, *Rahman*, 189 F.3d at 125-126, as well as for other garden variety crimes such as fraud, money laundering or illegal possession of firearms.

Indeed, the government originally employed this strategy with al-Marri, charging him with various criminal violations, including credit card fraud, making false statements to the FBI, and identity theft. Pet. Br. 3. Had al-Marri been convicted on all counts, he could have been sentenced for up to 30 years' imprisonment under federal sentencing guidelines because of the enhancements for terrorist-related activity. See U.S.S.G. § 3A1.4.[6] See also *id.* n.2.

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[6] Section 3A1.4 of the federal sentencing guidelines provides for an increased sentence for defendants charged with a felony "that involved, or was intended to promote, a federal crime of terrorism."

The government also used this strategy against Zacarias Moussaoui. The government originally arrested Moussaoui on immigration charges for overstaying his visa when he raised suspicions at the flight school he attended. He ultimately pleaded guilty to conspiracy charges related to the September 11 attacks on the World Trade Center and was sentenced to life. Judgment, *United States v. Moussaoui*, No. 01-cr-00455 (E.D. Va. May 4, 2006).

The government also has the authority to detain individuals during pending deportation proceedings. 8 U.S.C. § 1225(a) (authorizing the Attorney General to issue warrants for the arrest and detention of any alien pending a removal decision). Indeed, detention is mandatory when the alien is reasonably believed to be engaged in terrorist activity. 8 U.S.C. § 1226a(a)(3); see also *Demore v. Kim*, 538 U.S. 510, 513 (2003) (holding that mandatory detention under the Immigration Act does not violate the Due Process Clause). And once an order for removal has been entered, the government is authorized to detain the alien for a reasonable period necessary to secure removal. 8 U.S.C. § 1231(a)(1); *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001).

* * *

Judge Coughenour recently wrote that "[a]s constituted, U.S. courts are not only an adequate venue for trying terrorism suspects but are also a tremendous asset in combating terrorism." *The Right Place to Try Terrorism Cases*, WASH. POST, July 27, 2008, at B7. We wholeheartedly agree. The cases and statutes we have discussed demonstrate that the existing criminal justice system is more than up to the task of prosecuting and bringing to justice those who plan or attempt terrorist acts

within the United States—without sacrificing any of the rights and protections that have been the hallmarks of the American legal system for more than 200 years. But unless the Fourth Circuit's decision is overturned, the potential for indefinite Executive detention will threaten the civil liberties of everyone in this Nation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX

AMICI INFORMATION

The *amici curiae* are as follows:

Judge William G. Bassler served on the United States District Court for the District of New Jersey from 1991 to 2006 and on the Superior Court for the State of New Jersey from 1988 to 1991.

Robert C. Bundy was United States Attorney for the District of Alaska from 1994 to 2001. He is currently Of Counsel to Dorsey & Whitney LLP in Anchorage.

A. Bates Butler III was United States Attorney for the District of Arizona from 1980 to 1981 and First Assistant United States Attorney for the District of Arizona from 1977 to 1980.

Judge Edward N. Cahn served on the United States District Court for the Eastern District of Pennsylvania from 1974 to 1998 and served as Chief Judge from 1993 to 1998. Judge Cahn is currently Of Counsel to Blank Rome LLP.

W. Thomas Dillard was United States Attorney for the Eastern District of Tennessee in 1981 and the Northern District of Florida from 1983 through 1986. He is currently a partner at Ritchie, Dillard & Davies, P.C. in Knoxville.

Edward L. Dowd, Jr. was United States Attorney for the Eastern District of Missouri from 1993 to 1999 and the Deputy Special Counsel for the Waco Investigation under Special Counsel from 1999 to 2000. He is currently a partner at Dowd Bennett LLP in St. Louis.

Judge Susan Getzendanner served on the United States District Court for the Northern District of

Illinois from 1980 to 1987. From 1987 to 1991, she was a partner at Skadden, Arps, Slate, Meagher & Flom. Prior to serving on the federal judiciary, she was an associate and partner at Mayer Brown LLP. Since 1991, Judge Getzendanner has worked as an arbitrator.

Judge Shirley M. Hufstedler served on the United States Court of Appeals for the Ninth Circuit from 1968 to 1979. Judge Hufstedler also served as Associate Justice for the California Court of Appeals from 1966 to 1968, and as a judge on the Los Angeles County Superior Court from 1961 to 1966. In addition, she served as United States Secretary of Education from 1979 to 1981.

Judge Nathaniel R. Jones served on the United States Court of Appeals for the Sixth Circuit from 1979 to 2002 and as Assistant United States Attorney for the Northern District of Ohio. He is currently Of Counsel at Blank Rome LLP in Cincinnati, Ohio.

William A. Kimbrough was United States Attorney for the Southern District of Alabama from 1977 to 1981.

Nicholas deB. Katzenbach served as Attorney General of the United States from 1965 to 1966, Deputy Attorney General from 1962 to 1965, and Assistant Attorney General from 1961 to 1962.

Philip Allen Lacovara was Deputy Solicitor General of the United States in charge of criminal and internal security cases before the Supreme Court from 1972 to 1973, and Counsel to the Special Prosecutor, Watergate Special Prosecution Force, from 1973 to 1974. He is now senior counsel at Mayer Brown LLP in New York City.

Judge Thomas D. Lambros served on the United States District Court for the Northern District of Ohio from 1967 to 1995 and served as Chief Judge from 1990 to 1995. Judge Lambros also served as Judge of the Ohio Court of Common Pleas from 1961 until 1967.

Judge George N. Leighton served on the United States District Court for the Northern District of Illinois from 1976 to 1987. He served as Justice of the Illinois Appellate Court from 1969 to 1976 and as Judge on the Circuit Court of Cook County, Illinois from 1964 to 1969. Judge Leighton is a Senior Counselor of the Illinois Bar Association. Since retiring from the federal judiciary, Judge Leighton has been Of Counsel with the Chicago firm, Neal and Leroy, LLC.

Judge Timothy K. Lewis served on the United States Court of Appeals for the Third Circuit from 1992 to 1999 and on the United States District Court for the Western District of Pennsylvania from 1991 to 1992. He is a former Assistant United States Attorney for the Western District of Pennsylvania and Assistant District Attorney for Allegheny County, Pennsylvania.

David L. Lillehaug was the United States Attorney for the District of Minnesota from 1994 to 1998. He is currently an officer and shareholder at Fredrikson & Byron, P.A. in Minneapolis.

Kenneth J. Mighell was United States Attorney for the Northern District of Texas from 1977 to 1981 and Assistant United States Attorney for 16 years. He is currently Of Counsel to Cowles & Thompson in Dallas.

Judge Abner J. Mikva served on the United States Court of Appeals for the District of Columbia Circuit from 1979 to 1995, and served as Chief Judge from 1991 to 1994. He served as White House Counsel from 1994 to 1995. He served Illinois as a member of the United States House of Representatives from 1969 to 1973 and from 1975 to 1979. He was an Illinois State Representative from 1956 to 1966. He was a visiting professor at the University of Chicago from 1996 until 2008.

Judge Stephen M. Orlofsky served on the United States District Court for the District of New Jersey from 1995 to 2003 and was Magistrate Judge from 1976 to 1980. He is currently a partner at Blank Rome LLP.

H. James Pickerstein was Court Appointed United States Attorney for the District of Connecticut from 1973 to 1974 and Chief Assistant United States Attorney for the District of Connecticut from 1974 to 1986. He is currently a partner at Pepe & Hazard LLP in Connecticut.

Janet Reno served as Attorney General of the United States from 1993 to 2001. She was the State Attorney of the Eleventh Judicial District of Florida from 1978 to 1993.

Richard A. Rossman was United States Attorney for the Eastern District of Michigan from 1980 to 1981 and Chief of Staff for the Criminal Division of the United States Department of Justice from 1998 to 1999.

Judge H. Lee Sarokin served on the United States Court of Appeals for the Third Circuit from 1994 to 1996 and served on the United States

District Court for the District of New Jersey from 1979 to 1994.

Judge William S. Sessions was Director of the Federal Bureau of Investigation from 1987 to 1993. He served on the United States District Court for the Western District of Texas from 1974 to 1987, and served as Chief Judge from 1980 to 1987. He was United States Attorney for the Western District of Texas from 1971 to 1974. He is currently a partner at Holland & Knight LLP.

Thomas P. Sullivan was United States Attorney for the Northern District of Illinois from 1977 to 1981. He is currently a partner at Jenner & Block LLP in Chicago.

Judge Patricia M. Wald served on the United States Court of Appeals for the District of Columbia Circuit from 1979 to 1999, and served as Chief Judge from 1986 to 1991. She was the United States Judge to the International Criminal Tribunal for the Former Yugoslavia from 1999 to 2001.

Francis M. Wikstrom was United States Attorney for the District of Utah in 1981. He is currently an attorney at Parsons Behle & Latimer in Salt Lake City, Utah.

Judge Alfred M. Wolin served on the United States District Court for the District of New Jersey from 1987 to 2004. He was Presiding Judge for the Superior Court of New Jersey Criminal Division from 1983 to 1987, and a judge on the Superior Court of New Jersey, Civil Division, from 1982 to 1983.

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IN THE

Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,

Petitioner,

v.

DANIEL SPAGONE, U.S.N. COMMANDER,
CONSOLIDATED NAVAL BRIG,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICI CURIAE* OF FORMER NATIONAL SECURITY OFFICIALS AND COUNTERTERRORISM EXPERTS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are former national security officials and counterterrorism experts who have been working in this field for many decades.[2]

On December 12, 2001, Petitioner Ali Saleh Kahlah al-Marri was arrested in Illinois, where he lived with his wife and children, and eventually charged with crimes. On June 23, 2003 the charges were dismissed at the government's request. President Bush subsequently executed a declaration asserting that al-Marri was closely associated with al Qaeda. The government's allegations, if proven, would support conviction for violation of criminal statutes proscribing engagement in terrorism.[3] But no charges were brought and no crimes were prosecuted. Instead, Mr. al-Marri was transferred to Department of Defense custody, designated an "enemy combatant," and consigned to im-

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, or their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

[2] The Addendum attached hereto contains a list of the *amici*, along with biographical information for each.

[3] *See Al-Marri v. Pucciarelli*, 534 F.3d 213, 217 (4th Cir. 2008) (Motz, J., concurring) ("Like others accused of terrorist activity in this country, from the Oklahoma City bombers to the convicted September 11th conspirator, [al-Marri, or similarly situated America citizens] could be tried on criminal charges and, if convicted, punished severely.").

prisonment for an indefinite duration under severe conditions.

The government contends[4] that national security concerns support its claim of inherent and statutory authority to seize and detain indefinitely as "enemy combatants" individuals like Mr. al-Marri, who are legally present in the United States and are suspected of involvement in terrorism. We submit this brief because our experience with the nature of contemporary terrorism threats leads us to conclude that this approach to "terrorism suspects"[5] seized in the United States in fact *undermines* our national security, and greatly burdens the work and mission of those who now labor to keep the Nation safe.

Based on our expertise and experience, it is our firm conviction – and, we believe, the consensus among nearly all terrorism experts – that terrorism cannot be defeated by military action alone. Effective counter-terrorism efforts focus on eliminating popular support, particularly vis-à-vis recruitment. That, in turn, requires confronting the terrorist narrative and revealing its lies. Demonstrating our commitment to equality, justice, and the rule of law supports a counter-narrative that is essential to that effort and, we submit, to our national security.

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[4] *Amici* refer to the arguments previously made by the government. The new administration may present different arguments.

[5] Although we refer to Mr. al-Marri as a "terrorism suspect," in fact, he has been held for years, as if he had been convicted, solely on the say-so of the Executive.

SUMMARY OF ARGUMENT

The government defends its indefinite military imprisonment of Mr. al-Marri as an enemy combatant on the allegation that he was "closely associated" with al Qaeda and had "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism." Pet. App. 466a.

Committing or conspiring to commit acts of terrorism is a crime that may be prosecuted and punished under a variety of criminal statutes enacted by Congress.[6] Subjecting individuals apprehended inside the United States to indefinite military imprisonment as enemy combatants, instead of putting them on trial, invigorates the false – but widely accepted – narrative that the United States is engaged in a war on Islam, using its vast power to victimize Muslims, and that the terrorist is a noble warrior engaged in a holy war. Such treatment of a terrorism suspect is so far outside the traditions of this Nation that it undermines the credibility of our commitment to equality, justice, and the rule of law. The result is a powerful recruitment tool for violent extremists who claim allegiance to Islam, and greater risk to the security of the Nation.

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[6] *See* Br. *Amicus Curiae* of Former Federal Judges and Former Senior Justice Department Officials in Support of Petitioner (filed October 23, 2008) at 4-5 (citing statutes); Richard B. Zabel & James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* (Human Rights First 2008).

America, too, has a powerful tool in this "battle for hearts and minds." It is our commitment to our ideals. Like many other experts in national security and counterterrorism, we have come to understand that our national security depends upon undermining the terrorist narrative. Treating suspects seized in the United States according to our long-held principles, presenting charges and the opportunity for a trial, affirms our commitment to those ideals and discredits the terrorists' lies. In contrast, indefinite military detention of these suspects fuels the narrative that terrorists promote and undercuts our own. In so doing, it runs counter to effective counterterrorism strategy. As President Obama said:

> [I]t is precisely our ideals that give us the strength and the moral high ground to be able to effectively deal with the unthinking violence that we see emanating from terrorist organizations around the world.

President Barack Obama, Remarks at the White House Following Signing of Executive Orders (Jan. 22, 2009).

ARGUMENT

A. Indefinite Military Detention Of Persons Lawfully Residing In The United States, Without Criminal Charge Or Trial, Threatens To Undermine Our National Security.

1. We will not prevail against violent extremists by military force alone; drying up terrorist recruitment and support is essential to our national security.

We and other experts on national security and violent extremism have reached the same conclusion: the current terrorist threat cannot be defeated by the military alone.[7] Rather, the national security of the United States depends upon successfully waging what has variously been called an ideological struggle, "the

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[7] In a February 17, 2006 speech to the Council on Foreign Relations, Secretary of Defense Donald Rumsfeld said that some of the United States' most critical battles were now in the "newsrooms": "Our enemies have skillfully adapted to fighting wars in today's media age, but . . . our country has not," he said. New Realities in the Media Age: A Conversation with Donald Rumsfeld (Feb. 17, 2006) (transcript *available at* http://www.cfr.org/publication/9900/); Office of the Executive, National Strategy for Combating Terrorism 30 (Feb. 2003), *available at* http://www.state.gov/documents/organization/60172.pdf ("[T]he best antidote to the spread of terrorism" is building "a world consistent with the interests and values we share with our partners – values such as human dignity, rule of law, respect for individual liberties . . .").

battle for hearts and minds," and a battle between competing narratives. As Secretary of Defense Robert M. Gates observed:

> What is dubbed the "war on terror" is, in grim reality, a prolonged, worldwide irregular campaign – a struggle between the forces of violent extremism and those of moderation. Direct military force will continue to play a role in the long-term effort against terrorists and other extremists. But over the long term, the United States cannot kill or capture its way to victory.

Robert M. Gates, *A Balanced Strategy: Reprogramming the Pentagon for a New Age*, Foreign Affairs, Jan./Feb. 2009, at 28, 29.[8]

In a recent town hall meeting, Secretary Gates explained the crucial importance of defeating terrorist recruitment efforts. "[T]here are a lot of people out there who are susceptible to [the extremists'] message, who are susceptible to being recruited. And we have the opportunity to . . . keep them from turning to the extremists so that in fact we're dealing with a handful of fanatics instead of a larger group of people who are disaffected and who have come to hate us . . . ." Town Hall Meeting with Secretary Robert Gates at Balad Air Base, Iraq (Dec. 14, 2008) (transcript *available at*

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[8] General John P. Abizaid (Ret.), the former Commander of the United States Central Command, has described the struggle as "a war of intelligence and a war of perceptions." David W. Barno, *Challenges in Fighting a Global Insurgency*, Parameters: U.S. Army War College Quarterly, Summer 2006, at 15, 21.

http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4333).[9]

Stephen Hadley, National Security Adviser to President George W. Bush, also stressed the importance of competing with the terrorist vision: "It is more than just a military war on terror. It's broader than that. It's a global struggle against extremism. We need to dispute both the gloomy vision and offer a positive alternative." Eric Schmitt & Thom Shanker, *Washington recasts terror war as 'struggle,'* International Herald Tribune, July 27, 2005, at A8.

Hank Crumpton, former U.S. Ambassador for Counterterrorism and long-time counterterrorism official at the Central Intelligence Agency, has testified about the imperative to "replace an ideology of hatred with an ideology of hope. Over the long term, our most

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[9] *See also* Daniel S. Roper, *Global Counterinsurgency: Strategic Clarity for the Long War*, Parameters: U.S. Army War College Quarterly, Autumn 2008, at 92, 100-01 ("The most important components of the strategy is countering ideological support for terrorism – the 'decisive effort'.") (citing Joint Staff, J-5 briefing, *Combating Terrorism: The Long War*, December 2007)); Michael Chertoff, *Preventing Terrorism: A Case for Soft Power*, Harvard International Review, Summer 2008, at 14 ("The United States must fight not only the extremists, but the ideology of their extremism. It must stand firmly against malignant ideas which can only cause further poverty, degradation, and hopelessness by turning the clock back centuries. It must offer the alternative ideals of liberty and democracy, ideals which have brought more progress to more people over the past few centuries than in all the prior centuries combined. In other words, as during the Cold War, the situation must be seen as a war against an ideology, a contest of ideas, and a battle for the allegiance of men and women around the world.").

important task ... is not the 'destructive' task of eradicating enemy networks, but the 'constructive' task of building legitimacy, good governance, trust, prosperity, tolerance, and the rule of law." The Changing Face of Terror: A Post 9/11 Assessment: Hearing Before the S. Comm. on Foreign Relations, 109th Cong. 9 (June 13, 2006) (statement of Ambassador Henry A. Crumpton, Coordinator for Counterterrorism, U.S. Dep't of State), *available at* http://www.investigativeproject.org/documents/testimony/256.pdf.

President Obama's actions and words on his third day in office demonstrate his administration's determination that the struggle against violent extremists must be waged not only with military force but also with actions that reaffirm our commitment to equality, justice, and respect for the rule of law. Signing a series of Executive Orders to accomplish precisely that objective, he explained:

> The message we are sending around the world is that the United States intends to prosecute the ongoing struggle against violence and terrorism, and we are going to do so vigilantly; we are going to do so effectively; and we are going to do so in a manner that is consistent with our values and our ideals.
>
> We intend to win this fight. We are going to win it on our terms.

President Barack Obama, Remarks at the White House Following Signing of Executive Orders (Jan. 22, 2009); *cf.* President Barack Obama, Inaugural Address (Jan. 20, 2009) ("[O]ur power grows through its pru-

dent use; our security emanates from the justness of our cause, the force of our example; the tempering qualities of humility and restraint.").

2. Terrorists employ a false narrative about the objectives and values of the United States to glorify their heinous acts and promote recruitment.

Terrorism has been a part of human conflict forever. Our time has seen the flowering of a brand of terrorism practiced by those who claim to be engaged in a holy war.[10] Practitioners of this brand of terrorism invoke an inspirational mythology: they call themselves jihadists, soldiers in a holy war sanctioned by God, in order to ennoble what is otherwise ignoble conduct. Such terrorists confront in us a wealthier and profoundly more powerful adversary, and have made a virtue of necessity by developing a narrative of martyrdom. But martyrdom by definition destroys itself unless the martyr inspires successors to imitation. The practitioner of this brand of terrorism thus depends heavily on the inspirational power of his narrative. *See* Memorandum from the U.S. Dep't of Homeland Security, Terminology to Define the Terrorists: Recommendations from American Muslims 3 (Jan. 2008),

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[10] The religious affiliation claimed is Islam, although the practice of violent acts against civilians is antithetical to it. In discussing the current terrorist threat to our national security, and the "terrorist narrative," we focus, as the government does in seeking to justify the indefinite military detention of Mr. al-Marri, on those violent extremist groups, like al Qaeda, that falsely claim a basis in Islam for their acts.

available *at* http://www.dhs.gov/xlibrary/assets/dhs_crcl_terminology_08-1-08_accessible.pdf ("What terrorists fear most is irrelevance; what they need most is for large numbers of people to rally to their cause.").

Terrorist groups such as al Qaeda work hard, especially on the Internet, to promote their vision of a glorious global jihad against a hypocritical West – in particular, the United States – that is said to be waging war on Islam.[11] As the Department of Homeland Security describes it: "Bin Laden's narrative presumes a war against Islam and rampant mistreatment of Muslims by the American and other Western governments." Memorandum from the U.S. Dep't of Homeland Security, Terminology to Define the Terrorists: Recommendations from American Muslims 8-9 (Jan. 2008).

Our national security depends, in part, upon drying up support for groups like al Qaeda, and this is done most effectively by exposing their narrative as false. Military "detention" of individuals seized in the

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[11] *See, e.g.*, Osama bin Laden, *Letter to the American People*, The Guardian, Nov. 24, 2002, *available at* http://www.guardian.co.uk/world/2002/nov/24/theobserver ("Let us not forget one of your major characteristics: your duality in both manners and values; your hypocrisy in manners and principles. . . . You have claimed to be the vanguards of Human Rights . . . . However, all these things vanished when the Mujahideen hit you . . . . In America, you captured thousands the Muslims and Arabs, took them into custody with neither reason, court trial, nor even disclosing their names.").

United States has precisely the opposite effect, and indeed fuels that narrative.

3. Imprisoning Mr. al-Marri without trial instead of bringing criminal charges against him serves the terrorist narrative and threatens our national security.

a. Imprisonment without trial of individuals seized inside the United States promotes the false narrative of a United States engaged in a war on Islam and Muslims, which the terrorists exploit for recruitment.

Seizing individuals off the streets of America, declaring them enemy combatants, and asserting the right to keep them locked up indefinitely, with no formal charges or trial, is so far outside the traditions of fundamental fairness on which this Nation was founded that it perpetuates the perception generated by al Qaeda that we have abandoned our commitment to the rule of law.

We recognize that the security threat springs from the terrorists: U.S. policies and actions in no way justify the conduct of the terrorists. But the perception that the United States is failing to act in accordance with its fundamental values feeds the terrorist narrative, and thus undermines our efforts to confront the terrorist threat.[12]

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[12] *Amici* believe that combatant detentions authorized by this Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) – i.e., of individuals seized on the battlefield in Afghanistan, and participating

The significance of this dynamic is now broadly understood. As Retired General Wesley Clark said in an article about this very case:

> [Treating al-Marri as an enemy combatant] endangers our political traditions and our commitment to liberty, and further damages America's legitimacy in the eyes of others. . . . We train our soldiers to respect the line between combatant and civilian. Our political leaders must also respect this distinction, lest we unwittingly endanger the values for which we are fighting, and further compromise our efforts to strengthen our security.

Wesley K. Clark & Kal Raustiala, *Why Terrorists Aren't Soldiers*, N.Y. Times, Aug. 8, 2007, at A19.

Jeffrey H. Smith, former CIA General Counsel, testified before the Senate Armed Services Committee in 2007: "In our efforts to get tough with the terrorists we have strayed from some of our fundamental principles and undermined 60 years of American leadership in the law of war. In six short years, our disregard for the rule of law has undermined our standing in the world

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in active hostilities against U.S. military forces and their allies there – are fundamentally different from indefinite military detention without charge of an individual lawfully present in the United States on the claim that he is engaged in criminal terrorist activities. As noted elsewhere in this brief, the latter is clearly not consistent with well-established principles and practice regarding individuals taken into custody inside the United States. Moreover, the United States is not a zone of active combat and the challenges of gathering and preserving evidence present in a zone of active combat do not apply.

and, with it, our ability to achieve our objectives in the broader war." Meeting to Receive Testimony on Legal Issues Regarding Individuals Detained by the Department of Defense as Unlawful Enemy Combatants: Hearing Before the S. Comm. on Armed Services, 110th Cong. 3 (Apr. 26, 2007) (statement of Jeffrey H. Smith, Senior Partner, Arnold & Porter LLP), *available at* http://armed-services.senate.gov/statemnt/2007/April/Smith%2004-26-07.pdf.

One reason the United States does not face the level of homegrown terrorism threat that Europe has experienced is that immigrants are better integrated into American society. *See* James Fallows, *Declaring Victory*, The Atlantic, Sept. 2006, at 60 ("Something about the Arab and Muslim immigrants who have come to America, or about their absorption here, has made them basically similar to other well-assimilated American ethnic groups – and basically different from the estranged Muslim underclass of much of Europe."). Working with these Muslim communities in the United States, and building trust, is one of the most promising avenues for deterring young people from extremism. *See* Muslim Public Affairs Council, *The Impact of 9/11 on Muslim American Young People* 1 (June 2007) ("The more narrow the orbit of acceptance is toward young Muslims who are traversing the various stages of adolescence toward becoming young professionals, the more likely we will begin to see serious cases of radicalization that can evolve into trends."), *available at* http://www.mpac.org/publications/youth-

paper/MPAC-Special-Report--Muslim-Youth.pdf.[13] *See also* Stephen Magagnini, *Local FBI chief rebuilds trust with Muslim leaders*, Sacramento Bee, Dec. 1, 2008, *available at* http://www.sacbee.com/101/story/1438316.html.

Policies that drive a wedge between these communities and the government or the rest of society frustrate efforts aimed at increasing trust and understanding and, instead, increase a sense of alienation. In 2008, the Department of Homeland Security issued a memorandum that reflects how seriously those with responsibility for protecting the territory and people of the United States take the battle for hearts and minds. It concludes that "Bin Laden and his followers will succeed if they convince large numbers of people that America and the West are at war with Islam and that a 'clash of civilizations' is inherent." Memorandum from the U.S. Dep't of Homeland Security, Terminology to Define the Terrorists: Recommendations from American Muslims 7 (Jan. 2008). The DHS memorandum

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[13] *See also* Roots of Violent Islamic Extremism and Efforts to Counter It: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs, 110th Cong. 2 (July 10, 2008) (statement of Michael Leiter, Director, NCTC), *available at* http://www.nctc.gov/press_room/speeches/7-10-shsgac-radicalization-sfr.pdf ("There is no single underlying catalyst for the initial stages of radicalization. Although most individuals reject extremism outright, personal frustration at perceived social injustice and other grievances can prompt individuals to reassess their accepted worldview and be more open to alternative perspectives – some of which espouse violence. . . . Violent extremist groups try to foster and take advantage of this period of reassessment through propaganda and public outreach.").

emphasized the importance of conveying the message that "Muslims have been, and will continue to be part of the fabric of our country. . . . We must emphasize that Muslims are not 'outsiders' looking in, but are an integral part of America and the West." *Id.* at 8.

This essential message is dramatically undermined by seizing and indefinitely detaining Muslims inside the United States on the basis of an executive branch allegation that they are enemy combatants. While this policy may not expressly target Muslims, it has been applied only against Muslims, as have nearly all of the harsh policies adopted after 9/11.[14] This fuels the terrorist narrative of a war on Islam.

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[14] All of the individuals known to have been subjected to enhanced interrogation techniques have been Muslims, as are all the individuals who have been detained at Guantanamo Bay prison. When the government arrested more than 1100 people in secret in the weeks after 9/11 and held many of them illegally without charge in prisons, it targeted only Arabs and Muslims (apparently not understanding that not all Arabs are Muslims). *See* U.S. Dep't of Justice, Office of Inspector General, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection With the Investigation of the September 11 Attacks (Apr. 2003), *available at* http://www.usdoj.gov/oig/reports/FBI/index.htm. And the National Security Exit and Entrance Registration System program (which required fingerprinting, photographing, an immigration interview, and repeated "check-ins" for all males over age 16 who came here from countries with suspected links to terrorism) created enormous fear and mistrust in Muslim communities. *See* Philip Heymann, James Barr Ames Professor of Law, Harvard Law School, Muslims in America After 9/11: The Legal Situation 10-11 (Dec. 2006), *available at*

The DHS memorandum clearly explains the danger inherent in inadvertently reinforcing al Qaeda's propaganda. "Bin Laden's narrative presumes a war against Islam and rampant mistreatment of Muslims by the American and other Western governments. Extremist recruiters argue that Muslims should segregate from the larger society; moreover, their recruitment pitch depends on isolation." Memorandum from the U.S. Dep't of Homeland Security, Terminology to Define the Terrorists: Recommendations from American Muslims 8 (Jan. 2008).

The terrorist seeks to undercut an individual's sense of identity as a Muslim citizen of a state that values fair treatment and protects fundamental human rights. Policies that appear to accord Muslim suspects less than full equality under the law reinforce this dangerous and misleading message. *See* Islamic Extremism in Europe: Hearing Before the Subcomm. on European Affairs of the S. Foreign Relations Comm., 109th Cong. 7 (Apr. 5, 2006) (statement of Daniel Fried, Assistant Secretary of State for European Affairs), *available at* http://foreign.senate.gov/testimony/2006/FriedTestimony060405.pdf ("[W]e must also intensify our efforts to counter the extremist ideas that drive Islamic terrorism. . . . It . . . requires us to demonstrate through our own nation's experience that Muslims can be patriotic, democratic, and religious at the same time.").

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http://www.ces.fas.harvard.edu/conferences/muslims/Heymann.pdf.

Senior Counterterrorism Analyst Gina Bennett, until recently the Deputy National Intelligence Officer for Transnational Threats, first highlighted the national security risk of a double standard in an intelligence assessment written back in 1993, which also provided the first serious warning about Usama Bin Laden. That assessment, titled "The Wandering Mujahidin: Armed and Dangerous," concludes: "The growing perception by Muslims that the U.S. follows a double standard with regard to Islamic issues – particularly in Iraq, Bosnia, Algeria, and the Israeli-occupied territories – heightens the possibility that Americans will become the targets of radical Muslims' wrath. Afghan war veterans, scattered through the world, could surprise the U.S. with violence in unexpected locales." Gina Bennett, *The Wandering Mujahidin: Armed and Dangerous*, Weekend Edition (U.S. Dep't of State, Bureau of Intelligence and Research), Aug. 21-22, 1993, at 5, *available at* http://www.nationalsecuritymom.com/3/WanderingMujahidin.pdf. The foresight of this analysis was tragically proven on September 11, 2001. The danger to Americans of sending a message that the United States has a double standard for Muslims can no longer be viewed as hypothetical.

Nor is the impact of such messages considered hypothetical by those serving in Iraq and Afghanistan. As former Navy General Counsel Alberto Mora has testified, "there are serving U.S. flag-rank officers who maintain that the first and second identifiable causes of U.S. combat deaths in Iraq – as judged by their effectiveness in recruiting insurgent fighters into combat – are, respectively the symbols of Abu Ghraib and

Guantánamo." Hearing on the Treatment of Detainees in U.S. Custody Before the S. Comm. on Armed Services, 110th Cong. 5 (June 17, 2008) (statement of Alberta Mora, General Counsel, Dep't of the Navy), *available at* http://armed-services.senate.gov/statemnt/2008/June/Mora%2006-17-08.pdf. Again, harsh policies and actions that were directed only against Muslims fueled recruitment efforts, with direct and deadly consequences.

b. Military detention of Mr. al-Marri feeds the false narrative that the terrorists are holy warriors.

By treating a terrorism suspect apprehended within the United States as an "enemy combatant," rather than as a criminal suspect, we grant the suspect the very status a terrorist seeks, a status widely honored by those to whom terrorists propound their narrative. *See* Memorandum from the U.S. Dep't of Homeland Security, Terminology to Define the Terrorists: Recommendations from American Muslims 9 (Jan. 2008) ("Words matter. The terminology the [United States] uses should convey the magnitude of the threat we face, but also avoid inflating the religious bases and glamorous appeal of the extremists' ideology. Instead, [United States'] terminology should depict the terrorists as the dangerous cult leaders they are. They have no honor, they have no dignity, and they offer no answers. While acknowledging that they have the capacity to destroy, we should constantly emphasize that they cannot build societies, and do not provide solutions to the problems people across the globe face.").

The dilemma we create for ourselves takes on particular force where, as here, military imprisonment is indefinite.[15] As a military captive, the terrorism suspect is the continuing object of our own military force, and by imposing that force for an indefinite period of time, we continue to validate the terrorist narrative of the warrior and martyr. The prisoner may be regularly, if not constantly, in the public's mind, always available as a source of inspiration.

For example, a relatively insignificant Sudanese cameraman named Sami al Hajj became famous around the world by the mere fact of his long impris-

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[15] Mr. al-Marri's indefinite imprisonment has received significant attention in the Arab press. *See Detention of Qatari 'enemy combatant' flayed*, Al Jazeera, June 24, 2003, *available at* http://english.aljazeera.net/archive/2003/06/200841010357288816.html ("There are no plans to move al-Marri to a military prison at the U.S. Navy Base in Guantanamo Bay, Cuba where 680 suspects are being held in inhumane conditions without charge as part of Washington's 'war on terror.'"); *U.S. Told to Free 'Enemy Combatant,'* Al Jazeera, June 12, 2007, *available at* http://english.aljazeera.net/news/americas/2007/06/200852514462 3696313.html; *U.S. Court to Rule on 'al-Qaeda' case*, Al Jazeera, Dec. 6, 2008, *available at* http://english.aljazeera.net/news/americas/2008/12/200812519318 473235.html (stating al-Marri "has been held in virtual isolation on a U.S. navy prison ship near Charleston, South Carolina for almost five and a half years"); *Order to Review Case of Enemy Combatant*, Gulf Times, January 24, 2009, *available at* http://www.gulf-times.com/site/topics/article.asp?cu_no=2&item_no=268479&version=1&template_id=43&parent_id=19; *Campaign for Qatari's Release From U.S. Prison*, The Peninsula, Jan. 17, 2009, *available at* http://www.thepeninsulaqatar.com/Display_news.asp?section=Local_News&subsection=Qatar+News&month=January2009&file=Local_News2009011754945.xml.

onment at Guantanamo Bay as an enemy combatant. His captivity was regularly reported by al Jazeera and other Arabic news outlets, and closely followed by the more than a billion people reached by those outlets. *See, e.g., Profile: Sami al-Hajj*, Al Jazeera, May 2, 2008, *available at* http://english.aljazeera.net/news/americas/2008/05/200861505753353325.html; *Sami al-Hajj Hits Out at U.S. Captors*, Al Jazeera, May 31, 2008, *available at* http://english.aljazeera.net/news/africa/2008/05/20086150155542220.html.

In contrast, treating the terrorism suspect seized in the United States as a criminal suspect pursuant to statutes that proscribe engagement in terrorist activity focuses the narrative on the alleged terrorist activity, rather than his status as "warrior," thereby deconstructing the terrorist narrative. The heroism of armed conflict against the enemy becomes the cowardice of anonymous violence against innocent victims. The aspiring member of a great army, when isolated to his crime, becomes a small-minded individual.

About a warrior held in a military prison an extravagant mythology may be erected; but the fellow in the dock of a public trial, forced to witness the deliberate presentation of evidence of his cowardice becomes pathetic. His narrative loses the power to inspire. Like Ramzi Yousef, Fawaz Yunis, and many others convicted of terrorist acts in U.S. courts, he may soon be forgotten. Thus, the Director of National Intelligence's National Counterterrorism Center has urged intelligence professionals to

> Never use the terms "jihadist" or "mujahideen" in conversation to describe the terrorists. A mu-

> jahed, a holy warrior, is a positive characterization in the context of a just war. . . . Calling our enemies jihadists and their movement a global jihad unintentionally legitimizes their actions.

Counterterrorism Communications Center, National Counterterrorism Center, Office of the Director of National Intelligence, *Words that Work and Words that Don't: A Guide for Counterterrorism Communication*, March 14, 2008, at 2; *see also* Memorandum from the U.S. Dep't of Homeland Security, Terminology to Define the Terrorists: Recommendations from American Muslims 3 (Jan. 2008) ("The consensus is that we must carefully avoid giving bin Laden and other al-Qaeda leaders the legitimacy they crave, but do not possess, by characterizing them as religious figures, or in terms that may make them seem to be noble in the eyes of some.").

General Clark has also made this point:

> By treating such terrorists as combatants . . . we accord them a mark of respect and dignify their acts. And we undercut our own efforts against them in the process. . . . If we are to defeat terrorists across the globe, we must do everything possible to deny legitimacy to their aims and means, and gain legitimacy for ourselves. . . . [T]he more appropriate designation for terrorists is not "unlawful combatant" but the one long used by the United States: "criminal."

Wesley K. Clark & Kal Raustiala, *Why Terrorists Aren't Soldiers*, N.Y. Times, Aug. 8, 2007, at A19.

In sum, the government's argument that national security concerns justify and require the indefinite

military imprisonment of Mr. al-Marri as an enemy combatant is precisely backwards. Using the paradigm of the "war on terror" and the label "enemy combatant" to justify the indefinite military detention of individuals seized inside the United States does not preserve our national security; it threatens it.

B. Unwavering Commitment To America's Fundamental Values Makes Our Nation Strong And Is Essential To Protect The Nation Against The Terrorist Threat.

Discrediting the terrorist narrative and offering a positive alternative – *i.e.*, a narrative of equality, justice, and commitment to the rule of law – is critical to effective counterterrorism strategy. The national security benefits of adhering to our fundamental principles are broadly understood. *See* Office of the Executive, National Strategy for Combating Terrorism, 2 (Feb. 2003) (The Bush Administration declared, in the 2003 National Strategy for Combating Terrorism, "We will use the power of our values to shape a free and more prosperous world. We will employ the legitimacy of our government and our cause to craft strong and agile partnerships."); Michael German, *Squaring the Error*, *in* Law vs. War: Competing Approaches to Fighting Terrorism 11, 15-16 (Strategic Studies Institute, U.S. Army War College, 2005) ("This is a battle for legitimacy, and as such, it is one that we should easily win. As an open and free democracy regulated by the rule of law, we offer a future of peace and prosperity that the jihadist movement does not. . . . Respect for the rule of law, international conventions, and treaty obligations will not make us weaker, it will engender international cooperation and good will that make it impossible for

extremist movements to prosper."), *available at* http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=613; Dr. Kenneth Payne, *Waging Communication War*, Parameters: U.S. Army War College Quarterly, Summer 2008, at 37, 45 ("[E]ffective communication rests on credibility; communications that are not believed are simply hot air.").

Ultimately, the most credible voices revealing the emptiness of the terrorist narrative will be Muslim voices. However, these voices are more likely to be heard if American policies do not hand a megaphone to al Qaeda and their ilk.

The reality of a United States that is willing to fairly prosecute the terrorism suspect in a public trial will diminish and discredit the terrorists' lies and strengthen the credibility of the counter-narrative. This is how violent extremism will ultimately be defeated.

In the words of President Obama, "We know that to be truly secure, we must adhere to our values as vigilantly as we protect our safety – with no exceptions." President-Elect Barack Obama, Remarks at Announcement of Intelligence Team (Jan. 9, 2009).

CONCLUSION

The decision in this case will reinforce one of two narratives – our own or the terrorist's – and thereby either aid or encumber the Nation's ongoing counter-terrorism efforts. The Court should reverse.

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Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,
Petitioner,

v.

DANIEL SPAGONE, UNITED STATES NAVY COMMANDER, CONSOLIDATED NAVAL BRIG,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF FORMER UNITED STATES DIPLOMATS J. BRIAN ATWOOD, HARRY G. BARNES, JR., F. ALLEN "TEX" HARRIS, SAMUEL F. HART, JOHN L. HIRSCH, GENTA HAWKINS HOLMES, GILBERT D. KULICK, L. BRUCE LAINGEN, ELIJAH PARISH LOVEJOY IV, LAURENCE E. POPE, PAUL K. STAHNKE, ALEXANDER F. WATSON AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Each of the *amici curiae* has been in the diplomatic service of the United States government. Most of the *amici curiae* also submitted a brief *amici curiae* before this Court in the *Rasul* and *Al Odah* cases in 2004 and the *Boumediene* case in 2006.[2] For those cases, we argued that the United States' policy of detention and denial of *habeas corpus* to prisoners at Guantanamo undermined the diplomatic credibility of the United States and eroded our country's most precious diplomatic asset – this nation's values and in particular its reverence for the fundamental constitutional guarantee of individual freedom from arbitrary government authority.

In some ways, the instant controversy eclipses the concerns present in those prior cases. This is so because the fiction that the extra-territoriality of Guantanamo provides cover for our decidedly un-American detentions there is destroyed by the stark reality that the Petitioner here was legally in the United States, arrested on U.S. soil, and is being detained in the United States without criminal charge. The undersigned *amici curiae* argue that allowing such a result to stand will undercut the

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[1] The parties in the petitions have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amici* state that no person or entity other than the *amici curiae* or their counsel of record has made a monetary contribution to the preparation or submission of this brief.

[2] *Rasul v. Bush*, 542 U.S. 466 (2004), *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

positive effects on American diplomacy of this Court's decision in *Boumediene* and the new Administration's order for the closure of the prison at Guantanamo.

Our names and diplomatic posts are as follows:

J. Brian Atwood served as Under Secretary for Management in 1993 and as Administrator of the United States Agency for International Development from 1993 to 1999.

Harry G. Barnes, Jr. served as Ambassador to Romania from 1974 to 1977, Director General of the Foreign Service and Director of Personnel in the Department of State from 1977 to 1981, Ambassador to India from 1981 to 1985, and Ambassador to Chile from 1985 to 1988.

F. Allen "Tex" Harris retired after serving with the United States Department of State for thirty-five years, including Foreign Service posts in Argentina, Australia, South Africa, and Venezuela. Mr. Harris is a past President of the American Foreign Service Association.

Samuel F. Hart served as Ambassador to Ecuador from 1982 to 1985.

John L. Hirsch served as Ambassador to Sierra Leone from 1995 to 1998.

Genta Hawkins Holmes served as Ambassador to Namibia from 1990 to 1992, Director General of the Foreign Service and Director of Personnel for the Department of State from 1992 to 1995, and Ambassador to Australia from 1997 to 2000.

Gilbert D. Kulick served as a Foreign Service Officer from 1966 to 1989, retiring as Deputy Director of Southern Africa Affairs.

L. Bruce Laingen served as Ambassador to Malta from 1977 to 1979 and Charges D'Affaires in Tehran from 1979 to 1981.

Elijah Parish Lovejoy IV served as a consular officer at the Bridgetown, Barbados Embassy from 1997 to 1999.

Laurence E. Pope served as Associate Coordinator for Counter-terrorism from 1991 to 1993, Ambassador to Chad from 1993 to 1996, and Political Advisor to the Commander in Chief, U.S. Central Command, from 1997 to 2000.

Paul K. Stahnke is Minister Counselor, retired. Among other posts, he was Counselor of Mission at the

United States Mission to the Organization for Economic Cooperation and Development in Paris from 1978 to 1982, and Permanent Representative to the United Nations ESCAP (Economic and Social Council for Asia and the Pacific) from 1982 to 1988, while also serving as Economic Counselor in the United States Embassy in Bangkok during the same period.

Alexander F. Watson served as Ambassador to Peru from 1986 to 1989, Ambassador and Deputy Permanent Representative to the United Nations from 1989 to 1993, and Assistant Secretary of State for Western Hemisphere Affairs from 1993 to 1996.

SUMMARY OF ARGUMENT

At stake in the instant controversy is whether the United States Supreme Court will put its imprimatur on a type of military "enemy combatant" detention that has undermined America's credibility and standing in the world during the last eight years. The Petitioner in this case was legally in the U.S., arrested on U.S. soil, and is being detained indefinitely in the U.S. without criminal charge or trial. The undersigned *amici curiae* argue that, based on our professional experience in the diplomatic service of this country, American diplomatic credibility and effectiveness in many areas of international relations suffer from the widely shared perception that the U.S. has

abandoned the rule of law. Indefinite detention without criminal charge or trial is, for most people, the essence of this abandonment. Accordingly, a decision upholding our government's right to arrest and imprison anyone within its borders, without charge, will not only undercut our ability to convince dictatorial regimes to abandon similar practices, it will substantially undermine efforts to restore our international reputation and to obtain more cooperation from our allies in combating terrorism.

Our most effective diplomatic weapon – our nation's moral standing – is lost when our government holds itself to a different standard than it would have other countries apply. At this time, when a new Administration has come to power and seeks to gain traction in its various diplomatic efforts, the restoration of our standing in the world community is of particular import.

For these reasons, the decision of the United States Court of Appeals for the Fourth Circuit should be reversed with regard to the question presented in this appeal by Petitioner.

ARGUMENT

We, the *amici curiae* lending our names in support of this brief, have all been in the diplomatic service of the United States. Some have been ambassadors or foreign service officers; others have had appointments at senior levels in the Department of State or in the other agencies of the United States Government dealing with international relations. All are retired from public service.

It is not our purpose to argue the merits of the parties' respective legal positions in this case. Rather, we hope to expand on their presentation and what the Court may consider in its decision by setting forth our collective professional experience as to the significance for American diplomacy and international relations of the holdings of the court below.

We understand that in the case below, the United States Court of Appeals for the Fourth Circuit held that Congress, in the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001), vested the Executive with the power to seize individuals residing in this country, even Americans, and detain them indefinitely in military custody without criminal charge or trial based solely on a determination by the Executive that the individual planned to engage in terrorist activities. We also understand that the procedures for determining whether such detentions are justified are at best murky and leave uncertain the potential scope of the exercise of this unprecedented executive authority. We profess no special expertise in these issues from a constitutional perspective.

However, our professional experience convinces us that American diplomatic credibility and effectiveness in many areas of international relations suffer greatly from the widely shared perception that the United States has abandoned the rule of law and lost its bearings with regard to its traditional bulwarks against the unchecked authority of its government to seize and detain its residents without criminal charge or trial. The

Petitioner here, who was lawfully residing the United States with his family while pursuing a master's degree, was arrested at his home in the middle-American city of Peoria, Illinois, and has been held within the territorial boundaries of the United States for the better part of eight years without criminal trial or any currently pending criminal charges. The Petitioner alleges that, during this period, he has been held in solitary confinement, held nearly *incommunicado*, and subjected to abuses that have never previously been tolerated in the modern American penal system.

One hallmark of a dictatorship is the government's assertion of a right to arrest and indefinitely imprison anyone within its borders, citizen or non-citizen, without criminal trial or charges, and to confine such individuals in harsh and inhumane conditions. Aside from undercutting our ability to exercise moral suasion against such regimes, a decision upholding such a claimed right by the United States Executive will ill-serve our country as we seek to restore our international reputation and to obtain more cooperation from our allies in combating terrorism, in supporting our efforts in the wars in Afghanistan and Iraq, and in dealing with the Israeli-Palestinian conundrum.

Our professional experience informs us that the United States faces an international credibility gap resulting from a "do as I say not as I do" foreign policy that placed perceived threats to American security as the paramount ethic above its once venerated respect for freedom from unjustified

restraints on liberty. Indeed, in its prosecution of the war on terror, the United States has largely dispensed with its most valuable diplomatic asset – its values – and adopted a duplicitous stance that exempts our country from the same standard to which we expect others to adhere.

We have come to believe, in our representation of this country to other nations, that those nations are more willing to accept American leadership and counsel to the extent that they see us as true to the principle of freedom under the law. Yet, the evidence is clear that the world has taken notice of, and reacted negatively to, our government's increasing willingness to dispense with first principles of individual liberty. The State Department Legal Advisor in the previous Administration has acknowledged Guantanamo's disastrous impact on our foreign relations, calling it a "huge black eye for the United States – an albatross round our neck."[3] The group Human Rights Watch now lists Petitioner's detention as an "enemy combatant" in annual reports detailing world-wide human rights abuses.[4] The group specifically warns of the increasing danger of U.S.

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[3] Jonathan Beale, *'Struggle' to close Guantanamo Bay*, BBC News, Jan. 21, 2009, *available at* http://news.bbc.co.uk/2/hi/americas/7841805.stm.

[4] Human Rights Watch, *World Report 2004*, at 162-67, *available at* http://www.hsc.usf.edu/nocms/publichealth/cdmha/toolkit_dm/Documents/PDF/HRW--Human%20Rights%20Watch%20World%20Report%202004%20Part%20A.pdf.

policy in applying war-time powers against its residents and the perilous path upon which the U.S. has embarked. As elaborated in its 2004 World Report:

> The U.S. Government asserts that its treatment of ... al-Marri is sanctioned by the laws of war (also known as international humanitarian law) .... But the U.S. government is seeking to make the entire world a battlefield in the amorphous, ill-defined, and most likely never ending "war against terrorism." By its logic, any individual believed to be affiliated in any way with terrorists can be imprisoned indefinitely .... The laws of war were never intended to undermine the basic rights of persons, whether combatants or civilians, but the administration's rereading of the law does just that.[5]

Before the House Subcommittee on International Relations, a former Assistant Secretary of State for Democracy, Human Rights and Labor, testified that current U.S. policy detracts from our long term diplomatic goals in that it "needlessly antagoniz[es] our allies .... [and] unwittingly diminish[es] our capacity for exceptional leadership to address the global human rights

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[5] *Id.* at 167.

challenges ahead."[6] Petitioner's detention is specifically cited as an example of a practice that "encourage[s] other countries to commit similar abuses in the name of fighting terrorism and [as] undermin[ing] our ability to protest when they do."[7]

The double standards of the U.S. approach to human rights abroad and at home with regard to Petitioner, as well as Guantanamo, present an insurmountable challenge to our diplomatic mission. This is so because our most effective diplomatic weapon – our nation's moral standing – is lost when our government holds itself to a different standard than it would have other countries apply.

Consider that the United States Department of State provides an annual report to the Speaker of the House of Representatives and the Senate Committee on Foreign Relations offering "a full and complete report regarding the status of internationally recognized human rights" for

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[6] *House Comm. on Int'l Relations, 108th Cong., 1st Sess. (Statement of former Assistant Secretary of State for Democracy, Human Rights and Labor Harold Koh)* (July 9, 2003). Assistant Secretary Koh further counseled, as we believe, that:

> [D]emocracy and human rights should not be pursued in a selective or piecemeal fashion. The events of September 11th make clear that the United States must work to achieve its global objectives within a framework of international law and multilateral cooperation, holding ourselves to the same standards to which we hold others.

[7] *Id.*

essentially all countries in the world.[8] Among the offenses against "internationally recognized human rights" acknowledged and reported by the State Department are instances of "arbitrary arrest or detention" and "denial of fair public trials" – precisely what has happened to the Petitioner here.[9]

Petitioner has been held without criminal trial or legal justification for nearly eight years. He also alleges that he was held for periods as long as sixteen months *incommunicado*, when his family was denied access to see him, as were his attorneys. Petitioner further alleges that he was interrogated repeatedly in ways that bordered on torture, including sleep deprivation, painful stress positions, extreme sensory deprivation, and threats of violence or death.[10]

Compare this treatment with the further State Department report on human rights abuses in Iran, one of the most notorious totalitarian regimes in the world. For Iran, the State Department catalogued as human rights abuses the fact that:

> Detainees often went weeks or months without charges or trial, frequently were denied prompt contact with family, and often were denied access to

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[8] U.S. Department of State, *2007 Country Reports of Human Rights Practices* (Mar. 11, 2008), *available at* http://www.state.gov/g/drl/rls/hrrpt/2007/index.htm.

[9] *Id.* at http://www.state.gov/g/dr/rls/hrrpt/2007/100464.htm.

[10] *See* Petition for Writ of Certiorari, *Al-Marri v. Pucciarelli*, 129 S. Ct. 680 (Dec. 5, 2008) (No. 08-368).

> legal representation for prolonged periods ....[M]any detainees were held incommunicado .... In practice there was neither a legal time limit for incommunicado detention nor any judicial means to determine the legality of the detention ....[11]

This same State Department report on human rights abuses for Iran also describes common methods of prisoner abuse "includ[ing] prolonged solitary confinement with sensory deprivation, ... long confinement in contorted positions, ... [and] threats of execution if individuals refused to confess ...."[12]

The United States has historically been viewed as a beacon of light for its commitment to a basic tenet of Anglo-American law – that no one may be subjected to indefinite detention without charge, and that the conditions of justified confinement shall be humane. In our professional experience, we have found our commitment to these fundamental precepts of human dignity to be the strongest asset of American diplomacy. The admiration and respect for this nation abroad is a function of our own commitment to liberty under law and we have led the world in this cause. When our nation is perceived as applying these principles selectively, or ignoring them all together, our voice abroad is not only weakened but our adversaries are also

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[11] U.S. Department of State, *2007 Country Reports of Human Rights Practices, available at* http://www.state.gov/g/drl/rls/hrrpt/2007/100595index.htm.

[12] *Id.*

emboldened to conduct the very type of treatment against which we have historically rallied.

For example, explaining the detention of militants without trial, Malaysia's law minister said that the practice was "just like the process in Guantanamo Bay."[13] Egypt has also moved to detain human rights campaigners as threats to national security, as have Ivory Coast, Cameroon and Burkina Faso.[14] Russia, in its recent campaign in Georgia and brutality in Chechnya, has also heralded the war on terror as its primary justification.

As we argued in our brief *amici curiae* in *Boumediene*, it is not just dictatorial regimes that have commented with scorn on our practices with regard to terror detentions. Our allies and the broader global community have grown increasingly impatient with the willingness of the United States to dispense with its traditional principles with regard to its indefinite detentions of "enemy combatants."[15] While most of this criticism has been aimed at Guantanamo Bay, Petitioner's detention serves to amplify the chorus of world disapproval. This is because much of the prior Administration's

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[13] Sean Yoong, *Malaysia slams criticism of security law allowing detention without trial*, Assoc. Press, Sept. 17, 2003.

[14] Shehu Sani, *U.S. actions send a bad signal to Africa: Inspiring intolerance*, Int'l Herald Trib., Sept. 15, 2003.

[15] *See* Brief of Diego C. Asencio *et al.* as *amici curiae* in support of Petitioners at 10-14 in *Boumediene v. Bush* and *Al Odah v. United States*, nos. 06-1195 and 06-1196 (2006).

position on Guantanamo related to the fiction that the conduct there was justified because the detentions were occurring in Cuba and not within the territorial limits of the United States. While that technical distinction was lost on most, any persuasive effect that it did have is obliterated by the fact that Petitioner's arrest and confinement have all occurred within the United States.

Reversing the tide of negative sentiment against the United States and garnering the support of our allies has never been more critical than at this moment in history when a new Administration has come to power and seeks to gain traction in its various diplomatic efforts. President Obama has signed executive orders for the closure of the Guantanamo prison and for a change in course with regard to its practice of detention of "enemy combatants." The President's orders represent a genuine step toward renewal of our country's image in the world;[16] but the international goodwill inspired by his actions will quickly dissipate if we nonetheless insist on exercising the right to arrest and imprison without charge people legally within our own borders.

In the case of some sixty individuals who have been declared non-combatants but are still being held in U.S. custody, the cooperation of our allies is particularly critical because many of these

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[16] *See* Gerry J. Gilmore, *Gates Cites Positive Response to Pending Guantanamo Closure*, Am. Forces Press Serv., Jan. 22, 2009, *available at* http://www.defenselink.mil/news/newsarticle.aspx?id=52774.

individuals face the risk of persecution if returned to their home countries.[17] At least one close ally has already refused to accept exonerated detainees, and our ability to convince others to join us in finding a solution to this conundrum remains an open question that is no doubt hampered by the continued detention of Petitioner and others similarly situated to him.[18]

Our professional experience tells us that the first step in repairing our relationship with our allies and restoring American diplomatic credibility in the world at large is to renew our singular commitment to due process, the rule of law and human dignity without regard to the perceived justifications for dispensing with them. As former Secretary of State Madeleine Albright stated shortly before the attacks of September 11, 2001:

> One of the most dangerous temptations for a government facing violent threats is to respond in heavy-handed ways that violate the rights of innocent civilians .... We have found through experience around the world, that the best way to defeat terrorist threats is to increase law enforcement capacities

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[17] *Likely closure of Guantanamo raises question of what to do with inmates*, Irish Times, Jan. 10, 2009, *available at* www.irishtimes.com/newspaper/world/2009/0110/1231515470065.html.

[18] *Detainee migration "unlikely,"* Gold Coast Bulletin (Jan. 3, 2009) (noting that Australia refused a request in 2008 to resettle a small number of Guantanamo detainees).

> while at the same time promoting democracy and human rights.[19]

As Secretary Albright's words suggest, our experience tells us that we must be equally as vigilant in promoting liberty as we are in fighting terrorism. To do otherwise would be to sacrifice our values and to continue to lose standing as a just world presence. As we previously quoted to this Court, the words of George Kennan in describing the challenge of our previous generational fight against communism remain true today:

> [T]he greatest danger that can befall us in coping with this problem of Soviet communism, is that we shall allow ourselves to become like those with whom we are coping.[20]

Indeed, President Obama's Inaugural Address hearkened to the very same theme:

> As for our common defense, we reject as false the choice between our safety and our ideals. Our Founding Fathers... faced with perils that we can scarcely imagine, drafted a charge to assure the

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[19] Secretary of State Madeleine K. Albright, Speech at University of World Economy and Diplomacy, Tashkent, Uzbekistan (Apr. 17, 2000), http://www.civilsocietyinternational.org/resource/albright.htm.

[20] George Kennan, "*The Long Telegram*" from Moscow (Feb. 22, 1946), in Foreign Relations of the United States 706 Vol. VI, *available at* http://www.gwu.edu/~nsarchiv/coldwar/documents/episode-1/kennan.htm.

> rule of law and the rights of man – a charter expanded by the blood of generations. Those ideals still light the world, and we will not give them up for expedience sake.[21]

We add our names in support of Petitioner's brief and urge the Court to reverse the finding of the Court below because we believe that it is in America's long term diplomatic interest to conduct itself justly in fighting a just cause. Should we lose sight of the principles on which this country was founded, we will lose that which is most worth protecting.

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the Fourth Circuit should be reversed with regard to the question presented in this appeal by Petitioner.

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[21] Barack Obama, President of the United States, Inaugural Address (Jan. 20, 2009), *available at* http://www.whitehouse.gov/blog/inaugural-address/.

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ALI SALEH KAHLAH AL-MARRI,

Petitioner,

—v.—

COMMANDER DANIEL SPAGONE,
U.S.N., CONSOLIDATED NAVAL BRIG,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR *AMICI CURIAE* FOUNDING-ERA HISTORIANS AND EXPERTS IN AMERICAN LEGAL HISTORY IN SUPPORT OF PETITIONER

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The Virginia Report of 1799-1800 Touching the Alien and Sedition Laws; Together with the Virginia

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William V. Wells, *The Life and Public Services of Samuel Adams* (Boston, Little Brown & Co. 1865) ... 6

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INTEREST OF *AMICI CURIAE*[1]

This case raises the fundamental question of whether—and, if so, when—a lawful resident alien suspected of planning grave crimes against the United States and captured in the United States may be detained indefinitely by the military, notwithstanding the availability of traditional civilian criminal process. *Amici curiae* listed in Appendix A are Founding-Era historians and experts in American legal history who share a commitment to examining the Founders' views concerning the use of federal military authority in the domestic context and, in particular, the executive branch's use of federal detention authority.

SUMMARY OF ARGUMENT

In the opinion below, the Fourth Circuit held that the Authorization for Use of Military Force (the "AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001), permitted the President to order the indefinite military imprisonment of individuals lawfully residing in the United States without affording them the protections of the criminal justice system. It concluded that the President has such authority when he has designated such individuals as "enemy

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, its members, or its counsel made a monetary contribution to its preparation or submission.

combatants." *Amici* submit that the circuit court's holding is inconsistent with the Founders' understanding that military intrusion into domestic civilian affairs must be limited to preserve the People's liberty.

In this brief, *amici* have reviewed and summarized the applicable history of the Founding Era—the period from the Constitutional Convention through the War of 1812. The review includes examination of influences that shaped the Founders' thinking about the appropriate scope of the military's domestic authority and how that understanding is reflected and enshrined in the architecture of the Constitution, the Bill of Rights, and in the early statutes governing the militia and armed forces. Finally, it explores how the early federal government actually utilized the military in response to challenges to its authority. As summarized, it is evident that the beliefs and practices of the Founders demonstrate a heavy presumption against military detention for citizens and lawful resident aliens captured in the United States, and that such detention would be sanctioned, if ever, only if authorized by the most unambiguous statement from Congress.

Amici respectfully submit that the Founders would not have countenanced the indefinite, military detention of a lawful resident alien such as the Petitioner.

ARGUMENT

I. THE FOUNDERS REGARDED CIVILIAN CONTROL OVER DOMESTIC LAW ENFORCEMENT AS INDISPENSABLE TO A REPUBLICAN GOVERNMENT AND A BULWARK AGAINST MILITARY ENCROACHMENT.

The Founders' apprehension of military authority is well known and well documented. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 568 (2004) (Scalia, J., dissenting) (noting "the Founders' general mistrust of military power permanently at the Executive's disposal"); *Perpich v. Dep't of Defense*, 496 U.S. 334, 340 (1990) (acknowledging that "there was a widespread fear [at the Constitutional Convention] that a national standing Army posed an intolerable threat to individual liberty"); *Reid v. Covert*, 354 U.S. 1, 23 (1957) (plurality) ("The tradition of keeping the military subordinate to civilian authority may not be so strong in the minds of this generation as it was in the minds of those who wrote the Constitution."); *see also The Federalist* No. 41, at 321 (James Madison) (John C. Hamilton ed., Philadelphia, J.B. Lippincott & Co. 1869) (explaining that while "[a] wise nation . . . does not rashly preclude itself from any resource which may become essential to its safety, [it] will exert all its prudence in diminishing both the necessity and the danger of resorting to [a standing military force] which may be inauspicious to its liberties"). As Madison explained:

> A standing force . . . is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale it has its inconveniences. On an

> extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution. A wise nation will combine all these considerations; and, whilst it does not rashly preclude itself from any resource which may become essential to its safety, will exert all its prudence in diminishing both the necessity and the danger of resorting to one which may be inauspicious to its liberties. The clearest marks of this prudence are stamped on the proposed Constitution. The Union itself, which it cements and secures, destroys every pretext for a military establishment which could be dangerous.

The Federalist No. 41 (James Madison), *supra*, at 321.

The Founders' concern—which was rooted in the experience of the revolutionary era—is reflected both in the their early writings on the subject, and in the structure they adopted for the United States government, dividing the war power between the executive and legislative branches and guaranteeing fundamental protection of rights through the Constitution and Bill of Rights.

A. The Founders' View of the Proper Role of the Military in Domestic Affairs Was Shaped by Their Experiences During the Revolutionary Era.

The Founders believed firmly that in the colonies, no less than in Britain, any military force should be subordinate to civil authority.

In a representative pamphlet published in 1774, Thomas Jefferson protested that "his majesty has no right to land a single armed man on our shores" and, further, "[t]o render these proceedings still more criminal against our laws, instead of subjecting the military to the civil powers, his majesty has expressly made the civil subordinate to the military." Thomas Jefferson, *A Summary View of the Rights of British America* (1774), *reprinted in* 1 *The Papers of Thomas Jefferson* 133-34 (Julian P. Boyd ed., Princeton Univ. Press 1950). Similarly, in the years immediately preceding the American Revolution, the Continental Congress[2] condemned

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[2] The First Continental Congress convened on September 5, 1774 to address coercive policies adopted by Parliament against the colonies. *See* 1 Journals of the Continental Congress, 1774-1789, *supra*, at 5-6, 13 (Worthington Chauncey Ford ed., 1904). Among the first delegates were John Adams, Samuel Adams, John Jay, Patrick Henry and George Washington. *Id.* at 13-14. The Second Continental Congress, which also included Thomas Jefferson, convened from 1775 to 1789 and formally approved the Declaration of Independence on July 4, 1776, *see* 5 Journals of the Continental Congress, 1774-1789, *supra*, at 510-15, and the Articles of Confederation on November 11, 1777, *see* 9 Journals of the Continental Congress, 1774-1789, *supra*, at 928.

the imposition of military rule in the colonies because it was unlawful under British common law. *See* 1 Journals of the Continental Congress, 1774-1789, at 69 (Worthington Chauncey Ford et al. eds., 1937) (resolving, in 1774, that the people in the colonies had various rights, including the right to trial by jury, which had been illegally denied to them by the British military occupation). The Declaration of Independence likewise renounced the British King expressly because he "render[ed] the Military independent of and superior to the Civil Power." The Declaration of Independence para. 14 (U.S. 1776).

There were many oppressive aspects to the British military occupation of the colonies—particularly in the years just prior to the Revolution—that instilled in the Founders an especially strong aversion both to the domestic use of the military and to the subordination of civilian process to the military. Jonathan Turley, *The Military Pocket Republic*, 97 Nw. U. L. Rev. 1, 16 (2002). It was in Boston, beginning in 1768, that the British famously undertook the practice of quartering soldiers in colonists' homes as a form of intimidation. *See Reid*, 354 U.S. at 27 (plurality); 1 William V. Wells, *The Life and Public Services of Samuel Adams* 220 (Boston, Little Brown & Co. 1865). In reaction, Massachusetts statesman Samuel Adams warned that "where military power is introduced, military maxims are propagated and adopted, which are inconsistent with and must soon eradicate every idea of civil government." Samuel Adams, *Boston Gazette*, Oct. 17, 1768, *reprinted in* 5 *The Founders' Constitution* 215-16 (Philip B. Kurland & Ralph Lerner eds., 1987); *see also* 1 Wells, *supra*, at 221 (citing same).

Then, on March 5, 1770 in the Boston Massacre, five civilians in Boston were killed by British soldiers. Frederic Kidder, *History of the Boston Massacre, March 5, 1770*, at 29-30 (Albany, Joel Munsell 1870). This exhibited vividly the danger inherent in integrating the military into civilian life and outraged the colonists. *See id.* at 3; Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789-1878*, at 3 (1988) ("The image of hated Redcoats shooting down innocent citizens in the Boston Massacre . . . was a vivid one, easily transferable to any soldier employed as an instrument of internal control by a central government.").

Although martial law had not been invoked in the past one hundred years of British history, British colonial governors declared it twice in the year prior to the signing of the Declaration of Independence. *See* J.W. Gordon, *An Argument Against the Jurisdiction of the Military Commissions to Try Citizens of the United States* 32-33 (Indianapolis, Hall & Hutchinson 1865). In June 1775, the Royal Governor of Massachusetts declared martial law in Boston, prompting the Continental Congress to denounce the use of military law as a subversion of the common law.[3] *Declaration on Taking Arms* (Thomas Jefferson's First Draft) *in* 2 Journals of the Continental Congress, *supra*, at 137; *see also Reid*,

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[3] General Thomas Gage, the Royal Governor of Massachusetts, justified the declaration of martial law by claiming that the popular revolt in Massachusetts had caused the courts to be closed. The colonists, however, maintained that the act was illegal and repugnant. Gordon, *supra*, at 32-33.

354 U.S. at 28 n.49 (plurality). In November of that same year, the Royal Governor of Virginia declared martial law in Norfolk. "The Virginia Assembly denounced this imposition of the 'the most execrable of all systems, the law martial,' as in 'direct violation of the Constitution, and the laws of this country.'" *Reid*, 354 U.S. at 28 n.49 (plurality); *see also* Gordon, *supra*, at 32-34.

The Founders rebelled against these and other British efforts to subjugate civil authority to military force, ultimately declaring independence and embarking on a revolutionary war.

B. The Founders' Views About the Domestic Use of the Military and the Importance of Civilian Criminal Process Are Embodied in the Constitution and Bill of Rights.

The debates during the drafting and ratification of the 1787 Constitution and the 1791 Bill of Rights, as well as the ultimate structure of those documents themselves, reflect the Founders' view that the military, though necessary for national security, should remain subordinate to civil authority. At the same time, various provisions throughout the Constitution and Bill of Rights reflect the Founders' related conviction that individual liberty had to be stoutly protected against government—and particularly Executive—abuse.

1. The Founders Sought to Limit Domestic Use and Executive Control of the Military.

The Founders did not intend that the military should be used in connection with domestic law enforcement. In light of the frustration over the Articles of Confederation, which established a weak federal authority with no military power at all, it did, however, become clear to them that the national government needed to control both an army and the militias.[4] *See The Federalist* Nos. 15, 16, 17 (Alexander Hamilton), Nos. 18, 19, 20 (Alexander Hamilton & James Madison) (on "The Insufficiency of the Present Confederation to Preserve the Union"). Taking recognition of that, during the drafting and ratification of the Constitution, "it was obvious to [Mr. Madison] that when the civil power was sufficient, [military power] would never be put in practice." The Debates in the Convention of the Commonwealth of Virginia, 1788, *reprinted in* 3 *Debates on the Adoption of the Federal Constitution*, 384 (Jonathan Elliot ed., 2d ed., Washington, Printed for the Editor 1836) [hereinafter *Elliot's Debates*]. It would only be in circumstances in which the civil authority proved unable to contend with a domestic disturbance, that the Founders envisioned that an armed force—the militia, not the army—would be

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[4] Frustration was apparent after Shays' Rebellion in 1786 and 1787, when a group of poorly-armed debtors in Massachusetts were able to overwhelm the local authorities, forcing the closure of the courts. Under the Articles of Confederation, the federal government had no authority to put down the uprising. Coakley, *supra*, at 4-7 (1988).

called on by the federal government. *Id.* Recognizing that the military might be needed, they included explicit controls on the military in the Constitution.

Although the Constitution named the President Commander-in-Chief, it also imposed important limitations on that power: Congress—not the President—has the power to declare war, U.S. Const. art. I, § 8, cl. 11, and to control military appropriations, U.S. Const. art. I, § 8, cl. 12; *see also id.* § 7, cl. 1 (requiring that all appropriations bills originate in the House of Representatives). The President's military power is "dependent upon Congress for both the authority to wage a war and the means by which to do so." Turley, *supra*, at 22. Further, as Justice Jackson observed in *Youngstown Sheet & Tube Co. v. Sawyer*, "[th]ere are indications that the Constitution did not contemplate that the title Commander in Chief of the *Army* and *Navy* will constitute him also Commander in Chief of the country, its industries and its inhabitants." 343 U.S. 579, 643-44 (1952) (Jackson, J., concurring in the judgment and opinion of the Court).

2. The Constitution and Bill of Rights Reflect the Founders' Conviction That Ensuring a Robust Civilian Criminal Process Was Essential to Ensuring Individual Liberties.

In drafting the Constitution, the Founders believed that individual liberty would be best secured by the provision of a robust civil, as opposed to military, criminal process. *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 119 (1866) (referring to "the struggle

to preserve liberty and to relieve those in civil life from military trials" and concluding that the Founders, aware of this struggle, "secured in a written constitution every right which the people had wrested from power during a contest of ages"). They secured this protection by establishing a strong and independent Judiciary and numerous procedural safeguards intended to ensure that individuals received fair trials. *See Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946) ("Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued."); *The Federalist* No. 16 (Alexander Hamilton), *supra*, at 150 ("The majesty of the national authority must be manifested through the medium of the courts of justice."); *see also Milligan*, 71 U.S. (4 Wall.) at 121 ("Certainly no part of the judicial power of the country was conferred on [military commissions] . . . ."), *cited in Hamdan v. Rumsfeld*, 548 U.S. 557, 591 (2006).

The right to a trial by jury in criminal cases was one of the most significant protections included in the Constitution. U.S. Const. art. III, § 2 ("The trial of all crimes, except in cases of impeachment, shall be by jury."); *see also The Federalist* No. 83 (Alexander Hamilton), *supra*, at 614 (noting that the only real debate surrounding trial by jury is whether it should be understood more as "defence against the oppressions of an hereditary monarch [or] as a barrier to the tyranny of popular magistrates in a popular government."). Indeed, deprivation of the right to trial by jury was one of the driving forces of the American Revolution. *See supra* Section I.A; *see also Duncan v. Louisiana*, 391 U.S. 145, 152 (1968) (quoting the objections made in the Declaration of

Independence, including those "solemn objections to the King's making 'Judges dependent on his Will alone . . . ,' to his 'depriving us in many cases, of the benefits of Trial by Jury,' and to his 'transporting us beyond Seas to be tried for pretended offenses'").

The right to petition for the writ of habeas corpus likewise reflects the primacy placed by the Founders on the right of an accused to access to civilian courts. U.S. Const. art. I, § 9. In the Federalist Papers, Hamilton quotes Blackstone's discussion of the Great Writ:

> To bereave a man of life (says he) or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore *a more dangerous engine* of arbitrary government.

The Federalist No. 84 (Alexander Hamilton), *supra*, at 629 (emphasis in original) (quoting 1 Blackstone's Commentaries 136); see *also Boumediene v. Bush*, 128 S. Ct. 2229, 2244 (2008) ("The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom.").

The Founders also placed limits on how the crime of treason could be charged and tried, U.S. Const. art. III § 3, largely because of their fear that treasons—"Crimes against the state! and against the officers of the state!"—were "the great sources of danger and persecution, on the part of government, against the citizen." James Wilson, The Debates in the Convention of the State of Pennsylvania, 1787, *reprinted in* 2 *Elliot's Debates*, *supra*, at 469; *see also Cramer v. United States*, 325 U.S. 1, 27-28 (1945).

Numerous provisions in the Bill of Rights similarly reflect the Founders' concerns about the danger of unchecked Executive power, and their commitment to ensuring the rights of the individual in the face of government power—particularly in connection with criminal proceedings.[5] Jefferson expressed to Madison that his support of the Bill of Rights was based largely "on the legal check which it puts into the hands of the judiciary." Letter from

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[5] A number of amendments reflect the Founders' efforts to curtail oppressive military or other governmental authority over the individual. *See* U.S. Const. amend. III (restricting military's ability to quarter troops); *id.* amend. IV (requiring probable cause for search and seizure); *id.* amend. V (prohibiting double jeopardy, compelled self-incrimination, and the deprivation of life, liberty and property without due process) and—relatedly—to establish fair civilian criminal processes for the accused; *id.* (requiring indictment by grand jury except in cases "arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger"); *id.* amend. VI (ensuring the right to speedy public trial by jury, the right to know accusation, the right to confront witnesses, and the right to counsel).

Thomas Jefferson n to James Madison (Mar. 15, 1789) *in* 1 *The Founderers' Constitution*, *supra*, at 479; *see also* Letter from TThomas Jefferson to James Madison (Dec. 20, 1787), *in* 1 *The Founders' Constitution*, *supra*, at 456-57 (describing the Bill of Rights as "what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference"). As the Court observed in *Duncan v. Kahanamoku*, "We have always been especially concerned about the potential evils of summary criminal trials and have guarded against them by provisions embodied in the Constitution itself. Legislatures and courts are not merely cherished American institutions; they are indispensable to our Government." 327 U.S. at 322 (citations omitted).

II. THE STATUTES ENACTED BY CONGRESS IN THE PERIOD AFTER RATIFICATION STRICTLY LIMITED MILITARY INVOLVEMENT IN DOMESTIC LAW ENFORCEMENT AND DID NOT AUTHORIZE MILITARY DETENTION.

Shortly after the ratification of the Constitution, Congress enacted a number of statutes to take account of the fact that there would be occasions when the Executive would need to use military force domestically in the absence of event-driven congressional authorization. As described below, whether Congress authorized that force in the form of militias, the nascent volunteer army or a standing federal army, Congress only authorized the Executive's use of military force without further congressional approval if it was to be used against

combinations too powerful to be suppressed by civilian authorities or against imminent invasion. On the single occasion when Congress approved non-military detention of aliens, it did so explicitly and based on set standards, including a requirement that war already be declared by Congress. Finally, and of particular note here, Congress never statutorily authorized the military detention or trial of citizens or resident aliens.

A. The Militia Acts of 1792 and 1795.

On May 2, 1792, Congress enacted the first Militia Act "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions." Act of May 2, 1792, ch. 28, 1 Stat. 264, 264 (repealed 1795). The Militia Act gave the President power to call up the militia in cases of invasion by a foreign nation or Indian tribe, and also in cases of internal rebellion. *Id.* If the militia of the state where the rebellion was taking place either was unable to suppress it or refused to do so, the first Militia Act gave the President authority to use militia from other states. *Id.*

Its passage in 1792 was induced by a recent defeat at the hands of Indians on the frontier and "the state of things in Western Pennsylvania, where the opposition to the excise laws was very violent, and even threatened to prove too strong for the civil authority." Richard Hildreth, *The History of the United States of America* 312 (New York, Harper & Brothers 1852); Richard H. Kohn, *Eagle and Sword: The Beginnings of the Military Establishment in America* 133-35 (1975).

Congress was explicit as to what circumstances would allow the President to call forth the militia: the nation had to be confronted with "combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act." Act of May 2, 1792, § 2, 1 Stat. at 264. Moreover, there were two congressionally mandated prerequisites for the use of the militia power: First the President had to be notified of the circumstances by an associate justice of the Supreme Court or a district judge, and he then had to issue a "proclamation, command[ing] such insurgents to disperse, and retire peaceably to their respective abodes, within a limited time." *Id.* §§ 2, 3. Further, the Militia Act of 1792 limited the amount of time the President could use the militias of other states to thirty days after the commencement of the ensuing session of Congress, *id.* § 2—suggesting implicitly that further congressional authorization would be necessary for any extension of authority at that point.

The Militia Act of 1795 replaced the 1792 Act, and removed the requirement that the judiciary certify the existence of an insurrection. Act of Feb. 28, 1795, ch. 36, 1 Stat. 424, 424-25 (codified as amended at 10 U.S.C. § 332); *see also Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 28-32 (1827). Importantly, neither the 1792 nor 1795 Act gave the President any authority to declare martial law, detain civilians, or try them in military courts.

B. The Alien Friends Act and the Alien Enemies Act.

Nine years after the ratification of the Constitution, throughout June and July of 1798, Congress passed four statutes commonly referred to collectively as the Naturalization Act and the Alien and Sedition Acts. These statutes were enacted in the political context of an undeclared United States naval war with France. Although France was an ally of the United States during the American Revolution, tensions between the two countries grew in the wake of a dispute over repayment of the United States' war debt to France and a United States declaration of neutrality in the conflict between the British and French in 1793. *See generally* Gardner W. Allen, *Our Naval War with France* 1-15 (1909). After the French began seizing American ships trading with Great Britain, Congress rescinded treaties with France on July 7, 1798, marking the beginning of the so-called Quasi-War, and two days later authorized the Navy to attack French vessels. *See* J. Gregory Sidak, *The Quasi War Cases—And Their Relevance to Whether "Letters of Marque and Reprisal" Constrain Presidential War Powers*, 28 Harv. J.L. & Pub. Pol'y 465, 481 (2005). *See generally* Allen, *supra*, at 41-86. Along with the Naturalization Act, the Alien and Sedition Acts were enacted in the summer of 1798 in response to growing concern—animated by the conflict with France—over the potential threat that foreign residents posed to the young republic. *See generally* James M. Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (1956) (discussing the legislative history of each statute).

Each statute was intended to protect the nation from the enemy. Of the four, two pertained specifically to the President's authority to deport or detain resident aliens under certain limited circumstances: the Alien Friends Act and the Alien Enemies Act.[6] *See generally id.*

1. Alien Friends Act.

The Alien Friends Act (officially, the Alien Act) allowed the President "at any time during the continuance of this act, to order all such aliens as he shall judge dangerous to the peace and safety of the United States . . . to depart." Alien Act of 1798, ch. 58, § 1, 1 Stat. 570, 571 (expired 1801). In contrast to the Alien Enemies Act, the Alien Friends Act was based on perceived dangerousness rather than national affiliation, and it did not expressly provide that aliens coming under its domain could be "apprehended" or "restrained." *See* Alien Enemies Act of 1798, ch. 66, § 1, 1 Stat. 577, 577 (codified as amended at 50 U.S.C. § 21). If the President granted a permit under the Alien Friends Act, certifying that an alien initially ordered to depart the United States was not a security threat, Congress expressly provided that such a permit could set a durational limit on the alien's stay and designate a place of

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[6] The other two statutes were the Naturalization Act of 1798, ch. 54, 1 Stat. 566 (repealed 1802), which lengthened the residency requirement for citizenship, and the Sedition Act of 1798, ch. 74, 1 Stat. 5 (expired 1801), which made it a crime, among other things, to "combine or conspire together, with the intent to oppose any measure . . . of the government of the United States" and to publish "false, scandalous, and malicious writing" against the government and its officials.

residence. *See* Alien Act, ch. 58, § 1, 1 Stat. at 571. In the event that an alien who did not receive a permit from the President failed to depart within the time allotted by the order, that alien was subject to conviction and a prison term of up to three years. *See id.*

The Alien Friends Act inspired vigorous opposition on constitutional grounds, as summarized in the Virginia Resolution, authored by James Madison, and the Kentucky Resolution, authored by Thomas Jefferson. Viewed as a Federalist measure designed only for the temporary crisis with France, the Alien Friends Act included a two-year sunset provision and could be exercised in peace or war. *See* Smith, *supra*, at 35. The bill was moderated, in some respects, throughout the drafting process. For example, the first version of the bill authorized the President to remove all aliens who might be judged dangerous to the peace and safety of the United States, including suspected aliens. *Id.* at 51 (emphasis added). This first version of the bill also proposed a national surveillance system, which was omitted from subsequent versions of the bill, and a mandatory permit system for all enemy aliens, which was revised so that only aliens specifically ordered to depart from the country were required to apply for a permit proving harmlessness. *Id.* at 51-54.

Virginia's strong opposition to the Alien Friends Act was led by James Madison, who pointed to the statute's lack of a clear statement as a source of grave concern:

> Details, to a certain degree, are essential to the nature and character

> of a law; and on criminal subjects, it is proper that details should leave as little as possible to the discretion of those who are to apply and execute the law. If nothing more were required, in exercising a legislative trust, than a general conveyance of authority—without laying down any precise rules by which the authority conveyed should be carried into effect—it would follow that the whole power of legislation might be transferred by the legislature from itself, and proclamations might become substitutes for law. A delegation of power in this latitude would not be denied to be a union of different powers.
>
> To determine, then, whether the appropriate powers of the distinct departments are united by the act authorizing the executive to remove aliens, it must be inquired whether it contains such details, definitions, and rules, as appertain to the true character of a law; especially a law by which personal liberty is invaded, property deprived of its value to the owner, and life itself indirectly exposed to danger.

James Madison, Report on the Virginia Resolutions of 1798, *reprinted in* 4 *Elliot's Debates*, *supra*, at 560.

Madison and Jefferson lodged objections to the constitutionality of the Alien Friends Act on the grounds that it was overbroad and that it conferred legislative and judicial power on the President in violation of the separation of powers doctrine: "[I]t violates the judicial system; it confounds legislative, executive, and judicial powers; it punishes without trial; and it bestows upon the President despotic power over a numerous class of men." *Id.* at 531 (Madison). Congressman John Taylor argued that "the President would be the despot" of aliens under the Act. Debate on Virginia Resolutions, *reprinted in The Virginia Report of 1799-1800 Touching the Alien and Sedition Laws; Together with the Virginia Resolutions of December 21, 1798*, at 25 (Richmond, J.W. Randolph 1850) (statement of John Taylor). Jefferson criticized the Alien Friends Act for its attempt to transfer "the power of judging any person, who is under the protection of the laws, from the courts to the President of the United States." Thomas Jefferson, Kentucky Resolutions of 1798 and 1799, *reprinted in* 4 *Elliot's Debates*, *supra*, at 542. Jefferson also urged not only that the statute raised separation of powers problems, but that it seemed to run deeply counter to individual rights protected by the Constitution and Bill of Rights. He argued that because aliens subject to the Act were protected by both, "remov[ing] a person out of the United States . . . on [the President's] own suspicion, without accusation, without jury, without public trial, without confrontation of the witnesses against him, without hearing witnesses in his favor, without defence, without counsel, is contrary to the provision also of the Constitution [and] is therefore not law, but utterly void, and of no force." *Id.*

2. Alien Enemies Act.

Unlike the Alien Friends Act, the Alien Enemies Act was drafted not as a temporary measure but as a permanent wartime statute, and it enjoyed broad support from both Federalists and Republicans, neither of whom challenged the statute on constitutional grounds. *See Johnson v. Eisentrager*, 339 U.S. 763, 774-7 & n.6 (1950); Smith, *supra*, at 35. The Alien Enemies Act, first put to use during the War of 1812, remains good law today. It provides that aliens deemed enemies by virtue of a declared war may be "liable to be apprehended, restrained, secured, and removed as enemy aliens." Alien Enemies Act, 50 U.S.C. § 21. The Alien Enemies Act further authorizes the President "to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable." *Id.* Importantly, the Act provides expressly for judicial review to ensure compliance with the statutory elements required for detention and deportation, specifically whether war has been declared, whether the detainee is an alien, and whether the detainee is among natives, citizens, denizens, or subjects of the hostile nation. *Id.* § 23; *Ludecke v. Watkins*, 335 U.S. 160 (1948); *see also* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 992-94 (1998).

That the early Congress would enact such legislation which, by its terms, grants the President authority to detain or deport enemy aliens under certain circumstances reflects the Founding-Era recognition that the President lacked inherent constitutional authority, even in time of war, to

detain aliens within the United States as security threats. Smith, *supra*, at 37 (citing the belief of Congressman Samuel Sitegraves of Pennsylvania that "[m]easures of defense and protection for present exigencies should be the most particular duty of Congress because the president needed wide powers to meet this enemy"); *see also Brown v. United States*, 12 U.S. (8 Cranch) 110, 126 (1814) (observing that the enactment of the Alien Enemies Act implies that powers granted therein are not inherent upon a declaration of war).

Some of the congressional debates around the enactment of the Alien Enemies Act reflect that there were those—primarily Federalists—who believed the President's powers as commander-in-chief might include the power to detain. *See* 5 Annals of Cong. 1791 (1798) (quoting Congressman Harrison Otis as stating that "this could not be looked upon as a dangerous or exorbitant power, since the President would have the power, the moment war was declared, to apprehend the whole of these people as enemies, and make them prisoners of war"). Ultimately, however, the prevailing view was that the Alien Enemies Act conferred power to the President that he did not otherwise possess. As Congressman Samuel Sewall concluded:

> [I]t is necessary to provide for the public safety, and in all countries there is a power lodged somewhere for taking measures of this kind. In this country, this power is not lodged wholly in the Executive; it is in Congress. Perhaps, if war was declared, the President might then, as Commander-in-Chief,

> exercise a military power over these people; but it would be best to settle these regulations by civil process. They would be regulated by treaties as well as by the laws of nations. The intention of this bill is to give the President the power of judging what is proper to be done, and to limit his authority in the way proposed by this bill.

Id. at 1790.

Congressman Harrison Gray Otis argued that the Alien Enemies Act was unnecessary because the mere authorization of hostilities against the United States—as opposed to a formal declaration of war—should trigger the President's detention powers. Republicans, and even some Federalists, rejected Otis's position. *See* Smith, *supra*, at 37 ("Formalities and safeguards . . . should not hamper the government. . . . At a time of danger, the United States should not 'boggle about slight forms.'" (quoting 5 Annals of Cong., *supra*, at 1576). Congressman Sewall, the chief defender of the bill, argued successfully that Otis's proposal should be rejected because it would render national policy too indefinite and would give the President an improper power. *See id.* at 39; 5 Annals of Cong., *supra*, at 1574-75 ("[A]s it is an act of Congress to declare war . . . [i]f the words proposed [by Otis] were

introduced, the proposition would be rendered too indefinite . . . .").[7]

Though the scope of the President's inherent war powers may have been debated by the Founders, the Alien Enemies Act reflects the Founders' understanding that any delegation of wartime detention authority from Congress to the President must be made through clear and unambiguous legislation. The text of the statute is explicit in establishing the prerequisites for the arrest, detention and removal of persons deemed to be enemy aliens. *See* 50 U.S.C. § 21. It likewise contains a clear and unambiguous statement from Congress granting the President the authority to apprehend, restrain, secure and remove enemy aliens, so long as the enumerated statutory prerequisites are met.

Taken together, the acts discussed in this section reflect an acknowledgement by the early Congresses of the President's need to use military force and executive detention of aliens under certain, limited circumstances. At the same time, these Congresses circumscribed military involvement in domestic civilian affairs, and while they did authorize executive detention of lawful aliens, they never authorized military detention, even in the case

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[7] Notably, under the Alien Enemies Act, the Founders gave the United States marshals—not the military—the authority to apprehend and remove aliens pursuant to a warrant from the President or a court. *See* 50 U.S.C. § 24. Nothing in the Act permits the military to detain such aliens.

of enemy aliens found within the United States during time of war.

III. EARLY DOMESTIC USES OF MILITARY POWER WERE EXPLICITLY AUTHORIZED BY CONGRESS AND USED ONLY TO SUPPORT AND RESTORE CIVILIAN AUTHORITIES.

In the first quarter-century following the ratification of the Constitution, the federal government was confronted with a number of situations in which it used federal military power both to enforce federal law domestically and with its first declared war—the War of 1812—during which it placed restrictions on the freedom of enemy aliens.

Each of our first three Presidents faced a domestic insurrection. In each, the President had explicit authority from Congress. In each, the President determined, consistent with the authority granted by Congress, that civilian processes were not sufficiently robust to deal with the aggression. And most significantly, in each, the President's stated and executed goal was to use military power to reinstate the efficacy of those civilian processes, not to supplant them. Indeed, each incident ended with the military force delivering those detained to a civilian court. The federal government's response to each of these situations was consistent with both the sharp limits on military power and the protections of individual liberty embodied in the Constitution—which is all the more remarkable given the fragility of the young nation and new government at the time. Likewise, these early practices were inconsistent with executive authorization of indefinite military

detention of citizens and legal aliens apprehended within United States borders—particularly in the absence of unambiguous Congressional authority to do so.

A. The Whiskey Rebellion.

In the early 1790s, the grievances of the residents of western Pennsylvania were many, but their dissatisfaction was most intense when an excise tax was placed on whiskey in 1791. In July 1794, a U.S. marshal sent to enforce the excise law against the distillers faced opposition from a mob of thirty to forty men, and later, by a militia. The ensuing skirmishes left six wounded and one dead. 2 John Bach McMaster, *A History of the People of the United States* 189-91 (1924). During the following days, the insurrection escalated and, on July 30, some 7,000 to 15,000 men assembled to march on Pittsburgh. Coakley, *supra*, at 35.

It was promptly agreed that the Militia Act of 1792, discussed *supra*, Section II.A., had been drafted for just such a contingency, and President George Washington undertook carefully to comply with each particular mandate contained within the Act. First, he submitted evidence of the events in western Pennsylvania to Associate Justice James Wilson, who then issued a certification that tracked the language of what was required to be found by a federal judge under the 1792 Act. *Id.* at 37; 2 McMaster, *supra*, at 196. Once Wilson supplied the certification, the President issued the proclamation required by the Act, commanding the insurgents to disperse and retire peaceably. Coakley, *supra*, at 38. Although not required by the statute, Washington

then dispatched a commission composed of a U.S. Senator from Pennsylvania, an associate justice of the Pennsylvania Supreme Court, and the Attorney General to go to western Pennsylvania to offer amnesty in return for assurances that collection of the tax would not be further obstructed. *Id.* at 38-39. Though none of these actions resulted in the quelling of the insurrection, Washington had complied with the directives of Congress.

Washington then raised a militia of 10-15,000. *Id.* at 39, 41. Although military force was used against the insurrection, Washington's orders "established the vital principle that the purpose of the military was not to supplant but to support civil authority and that there should be no martial law or military trials of offenders." *Id.* at 54; *see also* 6 *The Works of Alexander Hamilton* 446 (Henry Cabot Lodge ed., 1904). The objects of the mission were solely to suppress the combinations which were in opposition to the excise tax, and to cause the law to be executed. Coakley, *supra*, at 54. Those objects were to be effected by military force and by judicial process. *Id.* Any leaders of the rebellion who were captured were to be delivered to civil magistrates; the rank and file were to be admonished, disarmed and sent home. *Id.* Further, once the offenders were delivered to civil authorities, "[t]he President admonished the Commanding General 'that the judge can not be controlled in his functions." *Duncan v. Kahanamoku*, 327 U.S. 304, 320-21 (1946) (quoting Washington's orders).

When the army arrived in the insurgent area in late October 1794, it faced no opposition. Coakley, *supra*, at 58. In accordance with its orders from

Washington, the army neither detained nor tried insurgents. Rather, the commanders delivered the guilty parties to the civilian authorities for indictment and, where appropriate, trial. Eventually twenty men were taken to Philadelphia to stand trial. Only two were ever convicted. *See id.* at 62-63; *United States v. Vigol*, 28 F. Cas. 376 (Paterson, Circuit Justice, C.C.D. Pa. 1795) (No. 16,621); *see also United States v. Mitchell*, 26 F. Cas. 1277 (Paterson, Circuit Justice, C.C.D. Pa. 1795) (No. 15,788).

The Whiskey Rebellion was "[t]he single largest example of armed resistance to a law of the United States between the ratification of the Constitution and the Civil War." Thomas P. Slaughter, *The Whiskey Rebellion: Frontier Epilogue to the American Revolution* 5 (1986). Although the supremacy of the federal government was threatened in a significant armed rebellion, President Washington used military force only in accordance with enacted law, and only then in order to reinstate civilian government control. An important precedent was established: "the military should not in itself perform any police or judicial functions." Coakley, *supra*, at 345.

B. Fries' Rebellion.

In July 1798, Congress enacted a one-year $2 million direct tax on houses, land, and slaves in order to prepare for a possible war against France. Coakley, *supra*, at 69. The tax proved immensely unpopular, and it inspired considerable resistance. In January 1799, an assessment commissioner sought to subpoena a number of the resisters in order

to determine the cause for their resistance. William W.H. Davis, *The Fries Rebellion, 1798-99*, at 45 (Doylestown, Doylestown Publ'g Co. 1899). When the subpoenas proved ineffective, a U.S. district judge in Philadelphia issued arrest warrants for the resistance leaders, and a U.S. marshal took many of the resistance leaders into custody. Coakley, *supra*, at 70-71; Paul D. Newman, *Fries's Rebellion: The Enduring Struggle for the American Revolution* 123-33 (2004). Before the marshal left town, however, a force of about 140 armed militia demanded the release of the prisoners. Newman, *supra*, at 138-39. The marshal released the prisoners, and there was no violence. *Id.* at 140.

The marshal reported the incident to a federal judge who, in turn, reported the events to President John Adams. In compliance with the terms of the Militia Act, President Adams issued a cease-and-desist order. *Id.* at 143. Throughout April 1999, the army arrested many of the resisters, including Fries himself. Coakley, *supra*, at 74-75. As in the Whiskey Rebellion, the purpose of the arrests was to submit the rebels to civilian processes, which they had previously been able to circumvent. All of those who were arrested were handed over to civilian authorities to begin criminal proceedings. About half of those arrested were charged with treason, and about half were charged with misdemeanors. *Id.* at 75-76. Of the eleven men charged with treason, ten stood trial, and juries acquitted seven. Newman, *supra*, at 180. The three men who were convicted of treason, including Fries, were pardoned by President Adams forty-eight hours before they were to be executed, and the President at the same time issued

a general pardon for all those who had opposed the tax. Coakley, *supra*, at 76; Newman, *supra*, at 183.

As with President Washington's use of force during the Whiskey Rebellion, President Adams' reliance on the military during Fries' Rebellion was narrowly circumscribed. Where civil law enforcement of the federal tax had entirely broken down, the President used the military to restore order, and to deliver the resisters to civilian authorities.

C. Burr Conspiracy.

Aaron Burr's intrigue against the territory of Spain and the United States likely started during 1804, around the time President Thomas Jefferson dropped him from his ticket in the 1804 election, and one year after the Louisiana Purchase. *See* Walter Flavius McCaleb, *The Aaron Burr Conspiracy* 18-20 (1903). He soon partnered with the commanding general of the U.S. Army, General James Wilkinson. *See* Thomas Perkins Abernathy, *The Burr Conspiracy* 15-16 (1954). Burr traveled all over the West gathering supporters to effect a separation of the western part of the United States from the rest of the country. Coakley, *supra*, at 78-79. He went so far as to approach Britain's minister to the United States for support. Abernathy, *supra*, at 15. As he traveled, however, rumors of his activities spread eastward. *Id.* at 27, 45, 97.

Once President Jefferson grasped the seriousness of the threat, he directed various western governors and district attorneys to monitor Burr and arrest him if he were to commit an overt act of

rebellion against the United States. *Id.* at 185. General Wilkinson, sensing the futility of any alliance with Burr, informed President Jefferson of the scope of Burr's activities. *Id.* at 188-90.

President Jefferson then issued a cease and desist order against any person involved in a conspiracy "to begin a military expedition or enterprise against the dominions of Spain." *Id.* at 190. Once Burr read the President's proclamation, he decided to submit to the civil authority of Mississippi, but the grand jury in the Territory of Mississippi did not indict him. Coakley, *supra*, at 81-82.

Jefferson did not have enough information to call up the militias under the Militia Act of 1795. He and General Wilkinson did, however, have enough information to use the regular army to prevent an expedition against Spanish territory in accord with the Neutrality Act of 1794, ch. 50, §§ 5, 7, 1 Stat. 381.[8] *See* Coakley, *supra*, at 79-80.

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[8] The Neutrality Act provides:

> That if any person shall within the territory or jurisdiction of the United States begin or set on foot or provide or prepare the means for any military expedition or enterprise to be carried on from thence against the territory or dominions of any foreign prince or state with whom the United States are at peace, every such person so offending shall upon conviction be adjudged guilty of a high misdemeanor. . . . [I]t shall be lawful for the President of the United States, or such other person as he shall have empowered for that purpose, to employ

(...continued)

A detachment of federal soldiers arrived to take Burr from the Mississippi authorities, but they refused to release him. Abernathy, *supra*, at 219. Burr then escaped, and the governor offered a reward for his recapture. *Id.* He was eventually captured by federal troops, stood trial in federal court for treason and high misdemeanors, and was ultimately acquitted. Coakley, *supra*, at 77-83.

After the Burr conspiracy, Jefferson called for an act that would allow him to use the army in a domestic insurrection. In March 1807, he signed a law that stated:

> [I]n all cases of insurrection, or obstruction to the laws, either of the United States, or of any individual state or territory, where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the land and naval force of the United

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(continued...)

> such part of the land or naval forces of the United States or of the militia thereof as shall be judged necessary . . . for the purpose of preventing the carrying on of any such expedition or enterprise."

Ch. 50, §§ 5-7, 1 Stat. 381, 384. Jefferson accepted General Wilkinson's information and placed Burr's guilt "beyond question." 16 Annals of Cong. 39, 40 (1807).

> States, as shall be judged necessary, having first observed all the pre-requisites of the law in that respect.

Act of Mar. 3, 1807, ch. 39, 2 Stat. 443, 443; *see also* Coakley, *supra*, at 83.

As with the previous two crises, the principle that the military should not perform any police or judicial functions was maintained, and civil, not military, judicial authority was employed.

D. War of 1812.

The nation's next major test came in a war with Great Britain. Following British trade restrictions designed to impede trade between the United States and France and growing anger over impressment of Americans into the Royal Navy, the United States declared war upon Great Britain. *See generally* Carl Benn, *The War of 1812*, at 1-19 (2003). The United States quickly found itself engaged in a war on three fronts: the seas, the coastlines and the Canadian border, and in response, President James Madison issued a proclamation pursuant to the Alien Enemies Act that all "alien enemies, residing or being within forty miles of tide water, were required forthwith to apply to the marshals of the states or territories in which they respectively resided, for passports, to retire to such places, beyond that distance from tide water, as should be designated by the said marshals," subject to certain exceptions. Presidential Proclamation of Feb. 23, 1813, *quoted in Lockington's Case*, Bright. (N.P.) 269, 271 (Pa. 1813); *see also* J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. Rev. 1402, 1412 & n.49 (1992).

As required in the proclamation, the statute was implemented by non-military authorities—U.S. marshals under the supervision of the State Department until April of 1813, when the President appointed a Commissary General for the Prisoners of War to assume sole authority in all matters concerning prisoners, which included the superintendancy of Alien Enemies. *See Lockington's Case*, Bright. (N.P.) at 271; Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Canon*, 9 Green Bag 2d 39, 41-43 (2005); Charles W. Sanders, *While in the Hands of the Enemy: Military Prisons of the Civil War* 16 (2005). The Office of the Commissary General, first established during the Revolution, was a fully institutionalized agency within the State Department during the War of 1812. Sanders, *supra*, at 16. At no time during the war did the Executive use the army to detain or try enemy combatants who were captured.

Thus, even when confronted with the nation's first declared war, the President refrained from imposing military detention or trial on enemy aliens and he acted pursuant to the Alien Enemies Act's clear and unambiguous terms.

CONCLUSION

For the foregoing reasons, the judgment below that the President has legal authority to detain Petitioner indefinitely and without trial as an "enemy combatant" based on the facts alleged should be reversed and the case remanded with instructions that the petition be granted and the government be directed to release Petitioner from military custody forthwith.

Respectfully submitted,

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Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,

Petitioner,

v.

DANIEL SPAGONE, United States Navy Commander, Consolidated Naval Brig,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF HISTORIANS AND SCHOLARS OF *EX PARTE QUIRIN* AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

Pursuant to Rule 37 of this Court, counsel of record have received timely notice of the intent to file this *amicus curiae* brief and have consented to its filing.

Amici are legal historians and scholars – Michal R. Belknap, A. Christopher Bryant, David J. Danelski, Louis Fisher, Peter Irons, and Pierce O'Donnell – each of whom has studied, written, and published on the Court's decision in *Ex parte Quirin*, 317 U.S. 1 (1942). They submit this brief to provide the Court with an historical account of the factual circumstances surrounding the decision in *Quirin*. *Amici* maintain that *Quirin* was an institutional defeat for the Court, a flawed decision that emerged out of a judicial process that is all but unthinkable today. Although the Court would be well within its discretion to repudiate *Quirin*, at a minimum this Court should decline to extend it to the very different facts of this case.

Michal R. Belknap, Professor of Law at California Western School of Law and Adjunct Professor of History at the University of California, San Diego, is a constitutional and legal historian and former

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission to this brief. *Amici* present their personal, not institutional, views.

Military Intelligence officer (1967-1969). He has published numerous scholarly works on legal history and related topics, including four articles examining *Quirin*. One of these, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 Mil. L. Rev. 59 (1980),was the first historical analysis of the case.

A. Christopher Bryant is Professor of Law at the University of Cincinnati, where he is the faculty advisor to the University of Cincinnati chapter of the Federalist Society. Professor Bryant, who has published several scholarly works on constitutional law and legal history, and who worked for all three branches of the federal Government before joining the academy, is the author, along with Carl Tobias, of Quirin *Revisited*, 2003 Wis. L. Rev. 309 and Youngstown *Revisited*, 29 Hastings Const. L.Q. 373 (2002).

David J. Danelski, a lawyer, political scientist, and former Navy JAG officer, is the Mary Lou & George Boone Centennial Professor Emeritus at Stanford University. Professor Danelski has published numerous works on constitutional law, legal history, and the Supreme Court, including *The Saboteurs' Case*, 1996 J. Sup. Ct. Hist. 61, a leading article on *Quirin* for which he received the Hughes-Gossett Award for Historical Excellence from The Supreme Court Historical Society.

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SUMMARY OF THE ARGUMENT

The Government relies on *Quirin* to support its assertion of power to seize and detain – indefinitely and without criminal charge or trial – a lawful resident of the United States suspected of affiliation with a terrorist organization. The historical consensus developed by *amici* and others demonstrates that *Quirin* cannot, and should not, bear that weight.

As this Court knows, *Quirin* involved eight men directed by the Nazi military in 1942 to invade the United States in disguise and commit acts of war. The facts surrounding the capture and trial of the saboteurs are extraordinary, as are the facts surrounding the Supreme Court decision to authorize the trial. Though six men were put to death in *Quirin*, history reveals that the Court had well-documented concerns about the validity of executive authority to establish the military commission that ordered their executions. The Court's decision in *Quirin* is tainted by conflicts of interest, undue executive influence, and judicial haste. Though the Government seeks to expand it here, *Quirin* is at best a flawed decision that should be limited to its facts. If necessary, this Court would be justified in going further, repudiating *Quirin* in order to reaffirm the centrality of deliberative process and impartial judgment in the rule of law.

ARGUMENT

I. The Historical Circumstances Surrounding *Quirin*

A. Background: the covert invasion, capture and military commission trial

In the summer of 1942, during World War II, eight German saboteurs landed on the beaches of Long Island and Florida. At the time, Nazi forces occupied most of Europe; Russia was reeling under a savage German assault; Nazi tanks were ravaging North Africa; and Great Britain stood precariously alone. Pierce O'Donnell, *In Time of War: Hitler's Terrorist Attack on America* 10, 19 (The New Press 2005). German U-boats patrolling the Atlantic were sinking thousands of tons of shipping, including U.S. and Allied ships, within sight of observers on the shores of the Atlantic Coast and in the Caribbean. *Id.* at 10. Just months earlier, Japan had destroyed Pearl Harbor, and the Japanese forces stretched a vast perimeter of conquest over the Pacific. *Id.* at 10-11, 19. As anxiety about the war took hold of the popular consciousness, America looked alarmingly vulnerable. *Id.* at 19.

Arriving by U-boats in military uniforms and then changing into civilian disguise, the German saboteurs were well funded by the German Government and armed with crates of explosives. Shortly after their arrival, one saboteur, George J. Dasch, had a change of heart and notified the Federal Bureau of Investigation of their arrival and plans. Dasch's

initial attempt to contact the FBI was more or less ignored; the agent made a note of the call but, assuming Dasch was a crank, did not forward it to Washington. *Id.* at 80-81. Dasch then travelled to Washington himself, where he eventually found an FBI agent who believed him. *Id.* at 84, 100-01. With Dasch's assistance, the FBI captured the other seven saboteurs over the next two weeks, before any could complete his mission. *See* Edward S. Corwin, *Total War and the Constitution* 117 (Alfred A. Knopf 1947). The American public embraced the news as a great victory. O'Donnell, *supra*, at 104; David J. Danelski, *The Saboteurs' Case*, 1996 J. Sup. Ct. Hist. 61, 65.[2]

The capture presented President Franklin D. Roosevelt with the question of how to prosecute the saboteurs. The FBI had captured the saboteurs on American soil at a time when the civilian courts were

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[2] In reciting the factual background of *Quirin*, *amici* rely primarily on Professor Danelski's historical account. *See* Danelski, *supra*, at 65-66. The history of *Quirin* has been researched extensively and recounted in numerous works. *See, e.g.*, Corwin, *supra*, at 117-27; Louis Fisher, *Nazi Saboteurs on Trial: A Military Tribunal and American Law* (Univ. Press of Kan. 2003); Louis Fisher, *Military Tribunals and Presidential Power: American Revolution to the War on Terrorism* (Univ. Press of Kan. 2005); O'Donnell, *supra*; Michal R. Belknap, *Alarm Bells from the Past: The Troubling History of American Military Commissions*, 28 J. Sup. Ct. Hist. 300 (2003); Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 Cal. W. L. Rev. 433 (2002); Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 Mil. L. Rev. 59 (1980).

open and operating – a critical point under the Articles of War and *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). Nevertheless, his advisors feared that the civil courts would not mete out sufficiently harsh sentences for the saboteurs' acts. *See* Danelski, *supra*, at 65-66. Roosevelt wanted the saboteurs executed, which his advisors believed could be accomplished only by a military trial. *Id.*

There was a second political reason to create a military commission. The Roosevelt Administration initially planned to bring the eight saboteurs to civil trial. But Dasch decided that he would explain in open court how he assisted the Government in locating his seven colleagues. The Administration had convinced the public (and enemy nations) that the FBI had an uncanny ability to discover and apprehend saboteurs. The Administration did not want one of those saboteurs to broadcast the fact that his fellows had been quickly rounded up only because he had betrayed them – and even then only because he had persevered in betraying them despite an initial FBI rebuff. Only a secret military commission would be likely to prevent the disclosure of these uncomfortable facts. Fisher, *Nazi Saboteurs on Trial*, *supra*, at 46, 54.

Within a week, President Roosevelt ordered that the saboteurs be tried before a military commission composed of seven retired generals, and he authorized the commission to impose a penalty of death.

Danelski, *supra*, at 67.[3] The presidential order departed from the Articles of War by permitting the admission of hearsay evidence in the trial, by reducing the number of votes necessary to convict on charges for which the death penalty was authorized, and by sidestepping the required review of certain sentences by the Judge Advocate General. *Id.*; *see* Appointment of Military Commission, 7 Fed. Reg. 5103 (July 7, 1942).[4]

A three week trial of the saboteurs before the military commission began on July 6, 1942. Danelski, *supra*, at 67-68, 71. Attorney General Francis B. Biddle served as chief prosecutor. Colonel Kenneth C. Royall served as chief defense counsel, representing

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[3] Administration officials concluded that existing law authorized prison sentences of no more than two or three years. Fisher, *Nazi Saboteurs on Trial, supra*, at 46-47. For an explanation how the President's order effectively provided an *ex post facto* law, see Cyrus Bernstein, *The Saboteur Trial: A Case History*, 11 Geo. Wash. L. Rev. 131, 157 (1943).

[4] Then, as now, certain Executive Branch officials paid scant attention to what were derisively referred to as "technical rights." General George Strong, the intelligence chief reporting to Secretary of War Henry L. Stimson, advised Stimson in a June 28, 1942 memorandum that "the prompt trial and execution" of the saboteurs by a military commission was necessary even though martial law had not been declared and the civil courts were open. He thought the "exigencies of the present situation" required "drastic action without too much deference to technical rights which might be accorded, under the Constitution. . . ." Record Group 165, NARA, Military Intelligence Service.

seven of the saboteurs with co-counsel Colonel Cassius M. Dowell. *Id.* at 67.[5]

The military commission began without a set of written rules. Roosevelt's military order authorized the commission to "make such rules for the conduct of the proceeding, consistent with the powers of military commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it." Appointment of Military Commission, 7 Fed. Reg. at 5103. The power to "make such rules" freed the commission from following the procedures enacted by Congress or those that appeared in the *Manual for Courts-Martial*. Rather than working from an established preexisting set of procedural rules known to both sides, the commission issued rules on an ad hoc basis in response to issues arising at trial. Fisher, *Nazi Saboteurs on Trial*, *supra*, at 52-54, 56-58.

B. The Legal Challenge: habeas petitions, the rush to judgment and the executions

On July 21, 1942, in the midst of the military commission trial, Royall announced that he would file federal habeas corpus petitions for the saboteurs to challenge the constitutionality of the military proceedings. *Id.* at 66-68; O'Donnell, *supra*, at 172-81.

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[5] The FBI's informant, George John Dasch, was separately represented by Colonel Carl L. Ristine. Danelski, *supra*, at 67.

On July 23, the prosecution and defense, along with Judge Advocate General Myron C. Cramer, met in person with Justices Owen Roberts and Hugo Black to discuss the Supreme Court's willingness to hear the case. Danelski, *supra*, at 68. On July 27, the Court announced that it would convene a special session to hear the matter on July 29. *Id.* On July 28, the saboteurs filed habeas petitions in the district court. *Ex parte Quirin,* 47 F. Supp. 431, 431 (D.D.C. 1942). The district court summarily – and immediately – denied the petitions that evening. *Id.*

On the next day, July 29 – the day after the district court denied the petitions – the parties submitted more than 180 pages of briefs to the Supreme Court. Danelski, *supra*, at 68. On that very day, the Supreme Court began hearing oral argument, which continued into the next day, July 30. *Id.* at 71.[6]

One day later, at 11:59 a.m. on July 31, the Supreme Court received papers from the D.C. Circuit affirming the district court's summary denial of the petitions. One minute after it received the D.C. Circuit's affirmance, the Court convened and granted certiorari. Gen. Myron C. Cramer, *Military Commissions: Trial of the Eight Saboteurs*, 17 Wash. L. Rev. &

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[6] Among the issues was whether Royall could argue the case in the Supreme Court without the D.C. Circuit having first acted. After some discussion, the Court agreed to let oral argument continue on the condition that Royall would present papers to the D.C. Circuit. Fisher, *Nazi Saboteurs on Trial*, *supra*, at 96-97.

St. B.J. 247, 253 (1942). The Supreme Court immediately denied the habeas petitions in a one-page *per curiam* order and announced that it would later file a full opinion addressing the merits. *See Quirin*, 317 U.S. at 1, 5-6; *see also id.* at 18-19 (reproducing the *per curiam* opinion in an unnumbered footnote).[7]

After the Supreme Court denied habeas, the military trial quickly resumed and concluded. Danelski, *supra*, at 71. The parties gave closing arguments the next day, on August 1. Two days later, the Commission found all defendants guilty of all charges, recommending death for all eight. *Id.* at 71. The Commission forwarded the transcript to President Roosevelt for his review. *Id.* at 71-72. The White House announced its approval of the Commission's decision on August 8, upholding six of the death sentences, commuting Dasch's sentence to 30 years and another cooperative saboteur's sentence to life imprisonment. *Id.* at 72. The Government began the executions at noon that same day and electrocuted the six saboteurs in a little over an hour. *Id.*; O'Donnell, *supra*, at 248-49.

Nearly three months would pass before the Supreme Court issued an opinion explaining its reasons for finding military jurisdiction proper and

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[7] The order summarily decided that (i) the President was authorized to order the trial before a military commission; (ii) the commission was lawfully constituted; and (iii) the saboteurs were held in lawful custody for trial before the commission. *Quirin*, 317 U.S. at 18-19.

thereby denying habeas corpus relief. *See Quirin*, 317 U.S. at 1 (full opinion filed October 29, 1942). Along the way, serious misgivings about the decision arose among the Justices, but undue Executive Branch influence and the Court's need to justify a *fait accompli* left little room to change course.

II. The Opinion in *Quirin* is Undermined by Historical Findings of Conflicts of Interest, Undue Executive Influence, and a Rush to Judgment.

Justices Scalia and Stevens had reason to describe *Quirin* as "not this Court's finest hour." *Hamdi v. Rumsfeld*, 542 U.S. 507, 569 (2004) (Scalia & Stevens, JJ., dissenting). As Justice Stevens noted two terms ago, "*Quirin* represents the high-water mark of military power. . . ." *Hamdan v. Rumsfeld*, 548 U.S. 557, 597 (2006) (Stevens, J., concurring) (explaining that "no more robust model of executive power exists"). In the more than 60 years since the Court issued *Quirin*, legal historians have uncovered a wealth of information that casts grave doubt on whether the water should ever have reached that high.

A. The deliberative defects

The Justices' deliberations after the electrocutions – like those before the electrocutions – were affected by President Roosevelt's credible threats to undermine the authority of the Court. As the *New*

York Daily News reported at the time, the significance of the question before the Court in *Quirin* was that "it pit[] the authority of the Supreme Court directly against that of the President." Fred Pasley, *Spies Challenge Jurisdiction of Court Chosen by Roosevelt*, N.Y. Daily News, (undated) (cited in Jack Betts, *The Trials of War*, Carolina Alumni Rev., Mar.-Apr. 2002, at 32, 37). President Roosevelt made it clear to the Court that he would assert the supremacy of his authority regardless of the Court's position. O'Donnell, *supra*, at 213.

The Roosevelt Administration had made plain that the President expected unanimous approval of the commissions. President Roosevelt was determined to block any judicial review of the Nazi saboteurs. He told Attorney General Biddle: "I won't give them up. . . . I won't hand them over to any United States marshal armed with a writ of habeas corpus. Understand?" Francis Biddle, *In Brief Authority* 331 (Doubleday 1962). In chambers, immediately before hearing argument in *Quirin*, Justice Roberts reported to his colleagues that Attorney General Biddle had privately expressed concerns that Roosevelt would execute the Germans no matter what the Court did. *Id.*; Danelski, *supra*, at 69. Justice Roberts added that he believed Roosevelt intended to have all eight men shot even if the Court did not acknowledge his authority. O'Donnell, *supra*, at 213. The threat was plain: if the Court did not give the President the power he wanted, then he would take it anyway, causing undeniable damage to the authority and

sovereignty of the Court. The point was not lost on Chief Justice Stone, who replied, "That would be a dreadful thing." *Id.*; Danelski, *supra*, at 69.

The Executive Branch was aided in its efforts by Justice Frankfurter, who had advised Secretary of War Henry L. Stimson to try the saboteurs by military commission. Fisher, *Nazi Saboteurs on Trial*, *supra*, at 95. Indeed, he had secretly advised the Administration about how to structure the military commission in anticipation of a Supreme Court challenge. Danelski, *supra*, at 66 (citing Diary of Henry L. Stimson (June 29, 1942) (on file with Microfilm, Library of Congress)). Despite these *ex parte* conversations with the Administration, and the resulting conflict arising out of the very case before the Court, Frankfurter did not recuse himself. Instead, he tried to spread his bias to the rest of the Court.

Chief Justice Stone assigned himself the opinion, Danelski, *supra*, at 72, and in the three months that followed, the Justices struggled to find common ground. *See, e.g.*, Michal R. Belknap, *Frankfurter and the Nazi Saboteurs,* 1982 Sup. Ct. Hist. Soc'y Y.B. 66, 68. The Chief Justice described his effort to secure a unanimous opinion as "a mortification of the flesh." *See* Alpheus T. Mason, *Inter Arma Silent Leges: Chief Justice Stone's Views*, 69 Harv. L. Rev. 806, 820-21 (1956) (citing Letter from Harlan Fiske Stone to Roger Nelson (Sept. 20, 1942), Harlan Fiske Stone Papers, Box 69 (on file with Manuscript Room, Library of Congress)).

Seeking to persuade reluctant Justices to rally around the result, Frankfurter wrote to his colleagues the "F.F. Soliloquy," a fictional dialogue between Justice Frankfurter and the habeas petitioners. "F.F. Soliloquy," Hugo LaFayette Black Papers 1883-1973, Box 269 (on file with the Manuscript Division, Library of Congress), *reprinted in* Belknap, *Frankfurter and the Nazi Saboteurs*, *supra*, at 66. The F.F. Soliloquy revealed a Justice openly hostile to the accused and "manifestly unwilling to afford them any procedural safeguards." *See* Belknap, *Frankfurter and the Nazi Saboteurs*, *supra*, at 66.

Frankfurter labeled the Germans "damned scoundrels" who had a "helluvacheek" filing the petitions, admonishing them: "You've done enough mischief already without leaving the seeds of a bitter conflict involving the President, the courts and Congress after your bodies will be rotting in lime." *Id.* at 69. According to Justice Frankfurter, the petitioners were "just low-down, ordinary, enemy spies who, as enemy soldiers, have invaded our country and therefore could immediately have been shot by the military when caught in the act of invasion." *Id.* After concluding that "for you there are no procedural rights," "F.F." ends his dialogue by telling the saboteurs, "you will remain in your present company and be damned." *Id.* at 70.

The F.F. Soliloquy shows that Justice Frankfurter "cared far more that these enemies be punished quickly than that they be tried fairly." *Id.* at 66. As well, it showed that his support for the Roosevelt

war effort trumped all constitutional concerns. *See* Fisher, *Nazi Saboteurs on Trial*, *supra,* at 120. Rather than communicate substantive constitutional arguments to his fellow Justices, Justice Frankfurter launched "imprecations to his fellow Justices not to become involved in sticky constitutional issues that might generate divisiveness amongst themselves." G. Edward White, *Felix Frankfurter's "Soliloquy" in* Ex parte Quirin: *Nazi Sabotage and Constitutional Conundrums*, 5 Green Bag 2d 423, 435 (2002). This Soliloquy is all the more remarkable because Justice Frankfurter directed it at six Germans who had been electrocuted months earlier.

The Court's haste in issuing its order before drafting a full decision vexed several Justices. In 1953, when the Justices debated whether to meet in summer session to hear the espionage case of Julius and Ethel Rosenberg, one Justice recalled how the Court a decade earlier had met during the summer to hear the Nazi saboteur case. It was further suggested that, as in *Quirin*, the Court could announce its judgment shortly after oral argument and file a full opinion later, with legal reasoning. Justice Robert Jackson rebuffed the proposal, and Frankfurter himself added that "'the *Quirin* experience was not a happy precedent.'" Fisher, *Nazi Saboteurs on Trial*, *supra*, at 134 (quoting "Memorandum Re: *Rosenberg v. United States*, Nos. 111 and 687, October Term 1952," at 8 (June 4, 1953), Frankfurter Papers,

Harvard Law School, Paige Box, Part I, Reel 70, LC).[8] In a 1962 interview, Justice Douglas recounted, "Our experience with [*Quirin*] indicated . . . to all of us that it is extremely undesirable to announce a decision on the merits without an opinion accompanying it. Because once the search for the grounds . . . is made, sometimes those grounds crumble." Danelski, *supra*, at 80 (citing Transcription of Interviews of William O. Douglas, by Walter F. Murphy, at 204-05 (on file with Seeley G. Mudd Manuscript Library, Princeton Univ.)).

Several years after *Quirin* was decided, John P. Frank, who had been Justice Black's law clerk in the summer of 1942, wrote that *Quirin* was an "instance[] of haste [where] the Court ha[d] allowed itself to be stampeded" by the Executive Branch. John P. Frank, *Marble Palace* 249 (Alfred A. Knopf 1958). "[I]f the judges are to run a court of law and not a butcher shop," Frank wrote, then "the reasons for killing a man should be expressed before he is dead; otherwise the proceedings are purely military and not for [the] courts at all." *Id.* at 250.

Alpheus T. Mason, author of a biography of Chief Justice Stone, explained how difficult it was for Stone

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[8] The unusual summer session is one reason for which the Court has cited *Quirin* as a limited precedent confined to the most extraordinary of circumstances. *See Cousins v. Wigoda*, 409 U.S. 1201, 1204 (1972) (Rehnquist, J.) (denying an application for a stay following oral argument, and observing that *Quirin* was one of only four cases heard in special session).

to draft the full opinion. In an effort to justify the already-executed death sentences, Stone confided in his clerk that he believed that "'the President's order probably conflicts with the Articles of War.'" Mason, *supra*, at 822 (quoting Letter from Harlan Fiske Stone to Bennett Boskey (undated), Harlan Fiske Stone Papers, *supra*). He wavered in his conviction that the Court needed to justify what had already been done, considering holding in favor of the petitioners. O'Donnell, *supra*, at 255. The Chief Justice recognized the weakness of the Government's arguments, remarking, "I hope the military is better equipped to fight the war than it is to fight its legal battles." *Id.* In drafting the full opinion, Chief Justice Stone was keenly aware that the judiciary was "in danger of becoming part of an executive juggernaut." Mason, *supra*, at 831.

But ultimately, the Chief Justice thought he had no choice but to uphold the jurisdiction of the military commissions. If the Court were to confess the error of its hasty order, it "'would leave the present Court in the unenviable position of having stood by and allowed six men to go to their death.'" Fisher, *Nazi Saboteurs on Trial*, *supra*, at 111-12 (quoting Chief Justice Harlan Fiske Stone, "Memorandum [to the Court] re Saboteur Cases," at 2 (Sept. 25, 1942), Harlan Fiske Stone Papers, *supra*). And the Chief Justice concluded that any such admission by the

Court, mere months after the saboteurs' executions, would come at too high an institutional cost.[9]

B. The substance that deliberative defects brushed aside

Quirin ultimately rested on its construction of Congressional action in enacting the Articles of War, which were the precursor to the Uniform Code of Military Justice (UCMJ). As history has since shown, the severe defects in the Court's deliberative process caused the Justices to ignore their serious concerns about the proper construction of those Articles. *Amici* do not aim here to suggest a proper construction of those Articles (which in any event have been superseded by the UCMJ and are not applicable in this case), but merely to show briefly that the case's deliberative defects led the Justices to set aside their serious substantive misgivings, both before and after the rendering of the full opinion.

On September 10, 1942, while working on a draft of the full opinion, Chief Justice Stone told Justice Frankfurter that he found it "'very difficult to

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[9] *See* XII William M. Wiecek, *The Birth of the Modern Constitution: The United States Supreme Court, 1941-1953* 320 (Cambridge Univ. Press 2006) ("Chief Justice Stone provided an accurate and fair evaluation of his handiwork: 'About all I can say for what I have done is that I think it will present to the Court all tenable and pseudo-tenable bases for decision.'" (quoting Stone to Frankfurter (Sept. 16, 1942)).

support the Government's construction of the articles [of war].'" Fisher, *Nazi Saboteurs on Trial*, *supra*, at 110 (quoting Letter from Stone to Frankfurter (Sept. 10, 1942), Frankfurter Papers, *supra*). In particular, the Justices were unable to agree on the construction of Articles 46 and 50½, a dilemma that Stone found "'embarrassing'" because six of the petitioners had been executed and it was "'too late to raise the question in their behalf.'" *Id.* at 112 (quoting Chief Justice Harlan Fiske Stone, "Memorandum [to the Court] re Saboteur Cases," *supra*, at 1). Frankfurter wrote with confidence that he had "not a shadow of doubt" that Roosevelt "did *not* comply with Article 46 *et seq.*" of the Articles of War. *Id.* at 117 (emphasis added). But, at least at that time, the non-compliance with the Articles of War did not matter to him.

Likewise, the *Quirin* Court's construction of Article 15 proved unsettling after the opinion's release. Shortly after the Court issued the full opinion in October 1942, Frankfurter took the extraordinary step of commissioning an analysis of the opinion by a military justice expert, Frederick Bernays Wiener. Fisher, *Military Tribunals and Presidential Power*, *supra*, at 121. In three successive analyses, Wiener found serious constitutional problems with the Court's decision. *Id.* Notably, Weiner criticized the Court for creating "'a good deal of confusion as to the proper scope of the Articles of War insofar as they relate to military commissions.'" *Id.* (quoting "Observations of Ex parte Quirin," at 1, signed "F.B.W." Frankfurter Papers). "Weaknesses in the decision

flowed 'in large measure' from the administration's disregard for 'almost every precedent in the books' when it established the military tribunal." *Id.* (quoting "Observations of Ex parte Quirin," *supra*).

Wiener's strongest criticism concerned *Quirin*'s interpretation of Article 15, which provided:

> The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.

Act of June 4, 1920, ch. 227, 41 Stat. 759, 790.

Quirin, of course, found that Congress's purpose in enacting Article 15 was to incorporate by reference the rules of the law of war. *Quirin*, 317 U.S. at 27-29. Yet the laws of war did not stretch so far as to encompass military commissions convened in the United States, away from the field of war. As Wiener noted in a letter to Frankfurter, in which he quoted Brigadier General Enoch H. Crowder's testimony to Congress, the purpose of Article 15 was merely to "'save[] to these war courts [including military commissions] the jurisdiction they now have and make[] it a concurrent jurisdiction with courts-martial, so that the *military commander in the field* in time of war will be at liberty to employ either form of court that happens

to be convenient.'" *See* Fisher, *Nazi Saboteurs on Trial*, *supra*, at 133 (quoting Letter from Wiener to Frankfurter at 1-2 (Aug. 1, 1943), Frankfurter Papers) (emphasis added); *see also* Danelski, *supra*, at 73, 79.[10] The *Quirin* court's interpretation of Article 15 – its conferral of military jurisdiction in certain proscribed circumstances off the battlefield – remains controversial. *See Hamdan*, 548 U.S. at 593 (noting that the Court then had "no occasion to revisit *Quirin*'s controversial characterization of Article of War 15 as congressional authorization for military commissions").

Compelled to justify the desired outcome, Chief Justice Stone's clerks unsurprisingly found "little authority" to support the desired outcome. A. Christopher Bryant & Carl Tobias, Quirin *Revisited*, 2003 Wis. L. Rev. 309, 323 (citing Letter from Harlan Fiske Stone to Bennett Boskey (Aug. 9, 1942), Harlan Fiske Stone Papers, *supra*); *see also* Mason, *supra*, at 820-21. His biographer offered this blunt assessment of the Justices' actions in *Quirin*: "Their

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[10] Wiener remained critical of *Quirin* for the rest of his life. In discussing *In re Yamashita*, 327 U.S. 1 (1946), he noted in 1987 that General MacArthur "had abandoned the rules of evidence" in *Yamashita* "because in the *Quirin* case everything hinged on the hearsay statements of co-conspirators," and the Executive Branch wished to avoid the evidentiary rule that such statements "couldn't be used against other conspirators." Frederick Bernays Wiener, Oral History 92-93 (1987) (on file at the library of The Judge Advocates General's School, Charlottsville, VA).

own involvement in the trial through their decision in the July hearing practically compelled them to cover up or excuse the President's departures from customary practice." Mason, *supra*, at 826. But having given permission for the saboteurs' executions, the Court felt that it had no practical option other than to uphold the exercise of military jurisdiction. *Id.* at 830.

III. *Quirin* Should Be Limited to Its Facts or Repudiated.

In *Boumediene*, this Court described *Quirin*, along with *Yamashita*, as "habeas cases involving enemy aliens tried for war crimes." *Boumediene v. Bush*, 128 S. Ct. 2229, 2270-71 (2008). While noting that significant criticism had been leveled, this Court concluded that it "need not revisit these cases" because they were distinguishable on their facts. *Id.* at 2271. So too here. *Quirin* need not – and should not – be extended to cover the very different facts of this case. But if this Court determines that it must conclude that *Quirin* is applicable to these facts, then *Quirin*'s core principles will have unraveled, and it should be revisited and squarely repudiated.

A. *Quirin* cannot be extended to cover this case.

The opinion in *Quirin* circumscribed domestic military jurisdiction while permitting its exercise, after the fact, on the particular facts of the Nazi saboteurs who had been electrocuted. *Quirin*, 317

U.S. at 45-46. The petitioners in *Quirin* did not contest the fact that they were affiliated with the armed forces of an enemy nation, or that they could be detained as combatants under the law of war. *Id.* at 21-22, 37-38. The *Quirin* court held that petitioners who, armed and in uniform, had crossed enemy lines and entered the United States on behalf of an enemy nation could be tried by military commission for violating the laws of war. *Id.* at 21-22, 31 (noting that soldiers landed by German submarines and came ashore in German Marine Infantry uniforms carrying explosives); *see also id.* at 22 n.1 (noting that the Eastern Seaboard had been designated a military defense zone, with military forces deployed along it to stop enemy soldiers from landing).

For *Quirin* to be applicable here, it would have to expand radically in several directions at once. First, it would have to provide authority for the detention without criminal charge or trial of those who are suspected of supporting a terrorist organization, rather than an enemy nation. Second, it would have to provide authority for the detention without criminal charge or trial of those who deny, rather than admit, their alleged status. Third, it would have to cover a petitioner who is indisputably not an enemy alien. Fourth, it would have to cover a person who has not been charged with a war crime.

Expanding *Quirin* in all four directions at once would rend it beyond repair. The *Quirin* court limited its holding to admitted uniformed soldiers of a foreign Government who snuck behind enemy lines during a

declared war in order to commit war crimes. Such soldiers unquestionably qualified as combatants within long established law-of-war principles. *Id.* at 30-31 & n.7 (citing, *inter alia*, the Hague Convention as evidence of "universal agreement and practice" on this matter). But inferring a detention power far beyond those circumstances, as the Government does here, causes the "longstanding law-of-war principles" on which *Quirin* rested to "unravel." *See Hamdi*, 542 U.S. at 521; *see also al-Marri v. Wright*, 487 F.3d 160, 195 (4th Cir. 2007) ("[T]he indefinite military detention of a civilian like al-Marri would shred those understandings apart."), *rev'd en banc sub nom. al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008).

B. If *Quirin* were applicable, it would properly be revisited and repudiated.

As Parts I and II make plain, improper influences adversely affected the decision-making process in *Quirin*: the state of war and a then-dominating Nazi army; the perceived threat of vulnerability of the United States to invasion from both the east and the west; the desire to support President Roosevelt in time of war; conflicts of interest among Court members; the Administration's threat to eviscerate the Court's authority; and the Court's face-saving rationalization in struggling to validate its hasty *per curiam* order in an opinion written after the executions occurred. Independently and collectively, these influences tarnish *Quirin*'s legitimacy – discrediting

an opinion that today forms the backbone of the Government's argument.[11]

The history of *Quirin* may well be "a fascinating tale of intrigue, betrayal, and propaganda . . . [of] questions of judicial disqualification; a rush to judgment; [and] an agonizing effort to justify a *fait accompli*. . . ." Danelski, *supra*, at 61. But it provides no foundation for the rule of law.[12] If at the time the

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[11] Aside from the conspicuous shortcomings in the manner in which *Quirin* was decided, the full opinion itself has been roundly criticized. The "most pernicious legacy of *Ex parte Quirin*" is the "Court's cavalier dismissal of *Ex parte Milligan*." O'Donnell, *supra*, at 262; *see also Hamdi*, 542 U.S. at 572 n.4 (Scalia, J., dissenting) ("The plurality's assertion that *Quirin* somehow 'clarifies' *Milligan* . . . is simply false. . . . [T]he *Quirin* Court propounded a mistaken understanding of *Milligan*. . . ."). *Milligan* remains a "seminal case," as this Court noted in *Hamdan*. *See Hamdan*, 548 U.S. at 591. Nothing suggests that the deliberative process in *Milligan* suffered from the severe flaws that it did in *Quirin*.

[12] To the contrary, the opinion has since been forcefully denounced. *See, e.g.*, Corwin, *supra*, at 118 (describing the decision as "little more than a ceremonious detour to a predetermined goal"); Fisher, *Military Tribunals and Presidential Power*, *supra*, at 124 ("The saboteur case of 1942 represented an unwise and ill-conceived concentration of power in the executive branch."); O'Donnell, *supra*, at 262 (describing the decision as "more [of] a political act than a judicial decision"); XII Wiecek, *supra*, at 320 ("As a specimen of judicial craft, it was transparently and disingenuously results-oriented, based on logic-chopping distinctions and evasive of real constitutional problems."); Belknap, *The Supreme Court Goes to War*, *supra*, at 87 (describing *Quirin* as a "dubious decision"); Bryant & Tobias, *supra*, at 364 (concluding that *Quirin* should be "understood as a relic of an unduly narrow and long-abandoned approach to

(Continued on following page)

Supreme Court's legitimacy required (as Chief Justice Stone then thought) that the Court justify what had already been done, then it is at least equally true sixty years later that contemporary knowledge of the circumstances of *Quirin* compels the opposite conclusion: that the Court's legitimacy would be enhanced, not undermined, by disavowing the decision.

Stare decisis is not "an inexorable command." *Lawrence v. Texas*, 539 U.S. 558, 577 (2003); *see also Hertz v. Woodman*, 218 U.S. 205, 212 (1910) ("The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court. . . .").[13]

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federal habeas corpus jurisdiction"); Maj. Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three – Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 Mil. L. Rev. 1, 108-09 (1998) (describing how with respect to the right to a trial by jury, "courts continue to blindly rely on . . . *Quirin* and [its] poorly reasoned conclusion, which was reached upon facts of no moment today"); White, *supra*, at 438 (describing how Justice Frankfurter's soliloquy "revealed himself to be a judge passionately engaged in promoting a particular outcome in a case, and strongly desirous of providing a cursory justification for that outcome"); Stephen I. Vladeck, Note, *The Detention Power*, 22 Yale L. & Pol'y Rev. 153, 170 (2004) (describing *Quirin* as "a paradoxical and controversial case through and through").

[13] Little law has been built atop *Quirin*. Its most prominent progeny is *Yamashita*. As *Boumediene* noted, *Yamashita* too has been "sharply criticized by Members of this Court." *Boumediene*, 128 S. Ct. at 2271 (citing *Hamdan*, 548 U.S., at

(Continued on following page)

> "The jurist concerned with public confidence in, and acceptance of the judicial system might well consider that, however admirable its resolute adherence to the law as it was, a decision contrary to the public sense of justice as it is, operates, so far as it is known, to diminish respect for the courts and for law itself."

Flood v. Kuhn, 407 U.S. 258, 293 n.4 (1972) (Marshall, J., dissenting) (quoting Peter L. Szanton, *Stare Decisis; A Dissenting View*, 10 Hastings L.J. 394, 397 (1959)). In short, where a decision "was not correct

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617 and *Yamashita*, 327 U.S. at 41–81 (Rutledge, J., dissenting)). *Yamashita* has also been the subject of widespread criticism by scholars. General Yamashita's five judges were officers on General Douglas MacArthur's staff with no legal experience; none of the officers appointed to defend him had any criminal defense experience. *See* Harlington Wood, Jr., *"Real Judges,"* 58 N.Y.U. Ann. Surv. Am. L. 259, 272-73 (2001) ("In General Yamashita's case, there had not even been the pretense of a fair and impartial trial in those military circumstances."). Moreover, the legal standard applied against General Yamashita was that he "must have [] known" about atrocities committed by his troops in the Philippines, even though there was no evidence that he knew of the atrocities or had in any way ordered them. Fisher, *Military Tribunals and Presidential Power*, *supra*, at 146, 148-49. Years later, when U.S. officers were charged with atrocities in Vietnam, they were tried under a different and more lenient standard. They had to have "actual knowledge." *Id.* at 153. *Quirin* has also been cited for assessing the Court's jurisdiction where a matter has not been addressed by the Court of Appeals, *see, e.g.*, *Hohn v. United States*, 524 U.S. 236, 246 (1998), and for evaluating whether a special session of the Court is appropriate for hearing such matters, *Cousins*, 409 U.S. at 1204.

when it was decided, . . . [i]t ought not to remain binding precedent." *Lawrence*, 539 U.S. at 578.

Where, as here, the "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification," a case should be repudiated. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 855 (1992). As Justice Brandeis noted, in "cases involving constitutional issues," the Court, "must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly ascertained, so that its judicial authority may, as Mr. Chief Justice Taney said, 'depend altogether on the force of the reasoning by which it is supported.'" *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412-13 (1932) (Brandeis, J., dissenting) (quoting *The Passenger Cases,* 48 U.S. (7 How.) 283, 470 (1849)), *majority decision overruled by Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 386-87 (1938).

Were *Quirin* to be expanded to cover the petitioner in this case, this Court's decision would entrench that case's errors more deeply in our law. Justice Jackson noted as much in his dissent from *Korematsu*. When the Court rationalizes "[a] military order, however unconstitutional" and validates the principle behind that order, Jackson warned, "[t]he principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds the principle more deeply in our law and thinking and expands it to new purposes." *Korematsu*

v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

As one historian put it:

> The frenzied pace of the proceeding and the Germans' execution without a full opinion gave the appearance that the Supreme Court was stampeded by Roosevelt. The justices heard argument without the benefit of reading the briefs ahead of time [and] decided the case in less than a day with virtually no collective deliberation (much less reflection). . . . In opting to draft an after-the-fact opinion that consciously sought to do the least damage to the judiciary at the expense of justice, Stone injudiciously gave short shrift to several issues on which the German saboteurs had the more persuasive legal argument. In the end, the Court felt it had no choice but to uphold the military tribunal's jurisdiction, casting itself as little more than a "private on sentry duty accosting a commanding general without his pass."

O'Donnell, *supra*, at 264 (quoting Mason, *supra*, at 830).

CONCLUSION

Quirin is a flawed decision that this Court should confine to its historical moment and facts. If it cannot be so confined, *Quirin* should be reconsidered and repudiated. *Amici* take no position on the ultimate resolution of the petition.

Respectfully submitted,

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Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,
Petitioner,

v.

DANIEL SPAGONE, U.S.N.,
CONSOLIDATED NAVAL BRIG.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* HUMAN RIGHTS AND RELIGIOUS ORGANIZATIONS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI[1]

Amici curiae Human Rights Watch, Center for Constitutional Rights, National Religious Campaign Against Torture, Evangelicals for Human Rights, Physicians for Human Rights, Islamic Society of North America and The Advocates for Human Rights[2] are not-for-profit public interest entities united in their common goal of ensuring the government's compliance with the law, even in the face of new challenges presented by the "war on terror." Through litigation, research, public education and advocacy—including for some, faith-based advocacy—*amici* have worked to ensure that the United States, as the historic leader in the development of fundamental human rights norms, abides by its obligations under the Constitution, laws and treaties governing the rights of persons held in its custody.

While *Amici* agree with the arguments presented in the Brief for Petitioner, Ali Saleh Kahlah al-Marri, they write specifically to highlight evidence demonstrating an improper, instrumental motive for al-Marri's "enemy combatant" designation and to bring to the Court's attention disturbing facts surrounding his five years of isolation and interrogation in military custody. *Amici* believe that

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[1] No counsel for any party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters of consent from the parties have been filed with the Clerk's office along with this brief.

[2] A full statement of each amicus' interest can be found in the Appendix.

these facts demonstrate not only that Congress could not have authorized this type of indefinite detention in its 2001 Authorization for the Use of Military Force, but also sharply underscore the very risks associated with domestic military detention that our constitutional system was designed to avoid in the first place.

SUMMARY OF ARGUMENT

The government has claimed authority to indefinitely detain a person who has been apprehended inside the United States—thousands of miles from any armed conflict—and who is unaffiliated with any enemy government, pursuant to the September 2001 Congressional Authorization for the Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224. The AUMF delegated to the President the power to use "necessary and appropriate force" against individuals he determines are responsible for the September 11, 2001 terrorist attacks. Relying on the Court's plurality opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the government has suggested that al-Marri is the equivalent of a traditional combatant under the laws of war and defends his detention as a "simple war measure."

Amici fully agree with Petitioner that the AUMF cannot be construed, consistent with the Constitution or the laws of war, to authorize the detention of a person such as al-Marri, who was apprehended by domestic law enforcement officials thousands of miles from any battlefield. Even if the AUMF could be construed to reach al-Marri, however, the alarming facts surrounding al-Marri's

designation and detention as an "enemy combatant" demonstrate the government's actions exceeded any limited authority granted by Congress.

In *Hamdi*, the plurality concluded that the AUMF authorized the detention of a "limited category" of persons captured in a zone of armed conflict because, under longstanding law-of-war principles, detention is considered a necessary incident to the use of force. However, as *Hamdi* recognized, the grant of power to detain carries with it corresponding limitations on the manner in which that power is used. To be considered a "necessary and appropriate" incident to the use of force, a detention must be only for the limited purpose of preventing a combatant's return to the battlefield, must be humane and not punitive, and must be reasonably limited to the period of active hostilities.

Yet even assuming al-Marri could be considered a "combatant" under the AUMF, the government has violated the conditions necessary to the exercise of any asserted detention power. First, by the time the President elected to designate him an "enemy combatant," al-Marri had already been incarcerated for approximately eighteen months in federal custody and was facing long-term imprisonment on the charges upon which he was indicted. Thus, his abrupt transfer to indefinite military detention was not "necessary" to the lawful end of preventing him from "returning" to any putative "battlefield." In addition, strong evidence suggests that al-Marri was transferred out of the criminal process precisely in order to evade the constraints of constitutional, statutory and international law, and to subject him to a newly developed regime of grinding, endless

isolation—one specifically calculated to render him helpless, despairing and maximally vulnerable to interrogation.

In sum, the government subjected al-Marri to "long-term detention for the purpose of interrogation," which the *Hamdi* Court concluded was "certainly" not authorized by the AUMF. 542 U.S. at 521. Indeed, the treatment al-Marri endured in detention runs afoul of hundreds of years of this country's most fundamental prohibitions against the abuse and torture of prisoners. *See Padilla v. Rumsfeld*, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting); *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944). The Court should avoid placing its imprimatur on the government's extra-legal conduct and should reject the government's asserted detention authority in this case.

FACTUAL BACKGROUND

A. Al-Marri's Criminal Detention

On December 12, 2001, al-Marri, a Qatari citizen lawfully present in the United States, was arrested by the Federal Bureau of Investigation ("FBI") at his home in Peoria, Illinois, at the direction of the United States Attorney's Office for the Southern District of New York. Appendix to Petition for Certiorari ("Pet. App.") 12a-13a. The U.S. Attorney alleged al-Marri to be a material witness in the government's investigation of the terrorist attacks of September 11, 2001. *Id.* He was imprisoned first in Peoria and then, following his transfer to New York, specially housed in solitary confinement in a maximum security prison. *Id.* at 13a.

In February 2002, al-Marri was charged in the Southern District of New York with possession of unauthorized or counterfeit credit card numbers with the intent to defraud. In January 2003, after nearly one year in segregated confinement, al-Marri was charged in a second, six-count indictment with making false statements to the FBI, making false statements in a bank application, and identity fraud. In May 2003, the court granted al-Marri's motion to dismiss the indictments for lack of venue, and he was returned to prison in Peoria. *Id.* at 323a.

There, a federal grand jury sitting in the Central District of Illinois returned a new indictment against al-Marri, alleging the same counts that had been dismissed. *Id.* Had the government obtained a conviction on these charges, al-Marri could have been imprisoned for up to 30 years under the Federal Sentencing Guidelines' permissible enhancements for alleged terrorist-related activities. *See* U.S. Sentencing Guidelines Manual § 3A1.4. Al-Marri pleaded "not guilty" to these charges on May 29, 2003, and the court set a trial date for July 21, 2003. Pet. App. 13a.

Immediately following his arraignment, the government barred counsel access to al-Marri, and announced it would be imposing Special Administrative Measures ("SAMs"), which are authorized in terrorism or national security cases. SAMs grant the government broad power to limit a defendant's ability to communicate non-legal

messages to his counsel or other persons outside the prison.[3]

B. The Evasion of the Federal Courts

On Friday, June 20, 2003, the court scheduled an evidentiary hearing on al-Marri's motion to suppress evidence. On the following Monday, approximately one week before the hearing and one month before trial, the government moved to dismiss al-Marri's indictment, based on a redacted declaration from President Bush designating al-Marri an "enemy combatant." Pet. App. 13a-14a. The declaration stated that al-Marri was "closely associated with al Qaeda," and that he had "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism." Pet. App. 466a. All of these allegations could have been prosecuted under existing federal criminal statutes, in addition to the charges for which al-Marri was already indicted.[4] Even though al-Marri was entering his eighteenth month in federal custody and was facing continued, long-term imprisonment and the imposition of restrictive SAMs, President Bush declared him a "continuing, present, and grave danger to the national security of the United States," whose military detention was

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[3] *See* 28 C.F.R § 501 (extending period of time in which SAMs can be imposed and broadening range of communications that can be monitored by government).

[4] *See, e.g.*, 18 U.S.C. § 2384 (criminalizing conspiracy to overthrow, make war against or oppose by force the government of the United States); 18 U.S.C. § 2339A (criminalizing the provision of "material support or resources" to terrorist organizations); 18 U.S.C. § 2332B (criminalizing "acts of terrorism transcending national boundaries").

"necessary to prevent him from aiding al Qaeda." Pet. App. 467a.

The Justice Department readily acceded to al-Marri's transfer out of the criminal justice system, and the Defense Department moved al-Marri to the Naval Brig in South Carolina. Attorney General Ashcroft has explained that, while in the criminal justice system, al-Marri refused offers to "improve his lot" by cooperating with FBI investigators; al-Marri was thus transferred to the military because he "insisted" on becoming "a hard case"—presumably because he elected to assert his constitutional entitlement to trial by jury. John Ashcroft, *Never Again: Securing America and Restoring Justice* 168-69 (2006); *see also Al-Marri v. Pucciarelli*, 534 F.3d 213, 237 n.19 (4th Cir. 2008) (Motz, J., dissenting).

This strategic use of the Article III courts mirrors the government's conduct in the case of the other domestically-apprehended "enemy combatant," Jose Padilla. In that case, just two days before a district court hearing on Padilla's motion to dismiss the material witness warrant against him, the government informed the court *ex parte* that President Bush had designated Padilla an "enemy combatant" and ordered his transfer to the custody of the Department of Defense. *Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42, 48-49 (S.D.N.Y. 2003), *aff'd in part, rev'd in part sub nom. Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 542 U.S. 426 (2004) (discussing government's "disappointing conduct" in case). On the question before the Court of whether the filing of a *habeas* petition on Padilla's behalf by his court-appointed attorney in New York was proper, four justices

emphasized that his transfer had been "shrouded in secrecy," and that the government should not be permitted "to obtain a tactical advantage as a consequence of an *ex parte* proceeding." *Padilla*, 542 U.S. at 459 and n.3 (Stevens, J., dissenting).

C. Isolation, Dependency and Trust

What government interest could be served by transferring al-Marri from confinement in a prison cell in the civilian system to a prison cell in the military system? In a declaration filed by Admiral Lowell E. Jacoby in Jose Padilla's case—a document the recently-appointed Deputy Attorney General in the Office of Legal Counsel described as the "Rosetta Stone" for understanding the Bush Administration's detention strategy[5]—the government laid bare its reasons for keeping Padilla in military custody.[6] Admiral Jacoby, the former Director of the Defense Intelligence Agency, explained in frank, clinical terms that the military's "robust program" for the interrogation of "enemy combatants" is "largely dependent upon creating an atmosphere of dependency and trust between the subject and

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[5] Martin Lederman, *The Rosetta Stone of the Detention/Interrogation Scandal*, Balkinization Blog, Aug. 14, 2007, *available at* http://balkin.blogspot.com/2007/08/rosetta-stone-of-detentioninterrogation.html (the Jacoby declaration is the "most important public government document" in the "detention/interrogation scandal" because it reveals that "the dominant purpose of this detention regime is intelligence-gathering")

[6] Declaration of Vice Admiral Lowell E. Jacoby (U.S.N.), Director of the Defense Intelligence Agency ("Jacoby Decl."), at 4-6, *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (seeking reconsideration of Jose Padilla's access to counsel).

interrogator." *Id.* at 4. Therefore, he explained, "it is critical to minimize external influences on the interrogation process." *Id.* at 5.

This process takes time, Jacoby warned: potentially "months, or even years." *Id.* at 4.[7] Access to counsel might "substantially harm our national security interests" because a prisoner can only be fully exploited for "all possible intelligence information," after he learns that "help is not on the way." *Id.* at 8. A prisoner must not be permitted to maintain an expectation "that his ultimate release may be obtained through an adversarial civil litigation process." In sum, allowing a prisoner to have any hope of release was understood to undermine the central goal of enemy combatant detention: interrogation. *Id.*[8]

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[7] In a declaration filed in Yasser Hamdi's case, the then-acting commander of the Guantanamo Bay detention facility asserted that, in order to maintain the atmosphere required for successful interrogation, the prisoner must be held in a "tightly controlled environment." *See* Declaration of Donald J. Woolfolk at 2, *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) *available at* http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/hamdi/hamdi61302wlflkdec.pdf.

[8] *See also* Lederman, *Rosetta Stone* ("[T]he dominant purpose of [the Bush Administration's] detention regime is intelligence gathering," which is something the "[Bush] Administration has concluded can only be effective if the will, the human agency, of the detainees is broken completely.").

D. The Authority for and Provenance of Al-Marri's Extralegal Detention and Interrogation

An examination of the genesis of the legal and policy decisions relating to al-Marri's detention further suggests that the government's motive in transferring al-Marri was exploitation through highly coercive interrogation methods, rather than incapacitation. Most directly, on March 14, 2003, only three months prior to al-Marri's transfer, the Deputy Assistant Attorney General in the Office of Legal Counsel, John Yoo, issued a Memorandum to the General Counsel of the Department of Defense[9] ("March 2003 Memo"), which gave near-blanket authority for Defense Department personnel to conduct detention and interrogation operations outside the constraints of law. The March 2003 Memo concluded that the Fifth Amendment does not "address actions the Executive takes" against persons the president designates as "enemy combatants" (March 2003 Memo at 6-9); it reiterated a prior conclusion that the Fourth Amendment has "no application to *domestic* military operations" (*id.* at 8 n.10 (emphasis in original)), and tellingly asserted that the Eighth Amendment prohibition

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[9] Memorandum from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, to William J. Haynes II, General Counsel for the Department of Defense, *Re: Military Interrogations of Alien Unlawful Combatants Held Outside the United States* (Mar. 14, 2003). Although the March 2003 Memo focused on the legal status of "enemy combatants" held outside the United States—where, in fact, the overwhelming majority were detained—the document explicitly stated that its conclusions applied also to domestically detained "enemy combatants." *Id.* at 8.

against "cruel and unusual punishments" "applies solely to those persons upon whom criminal sanctions have been imposed," but not to "enemy combatants" (*id.* at 10).

The March 2003 Memo also replicated verbatim arguments made in a now-infamous 2002 Memorandum authored by the same Office of Legal Counsel to the Central Intelligence Agency, which had concluded that there could be virtually no statutory or international law constraints on CIA interrogation operations.[10] According to both Justice Department memoranda, 18 U.S.C. § 2340, which criminalizes acts of torture committed by U.S. officials, would not proscribe an interrogator's conduct unless he acted with the narrow "specific intent" to torture, which was defined to cover only pain equivalent to "organ failure" or "death." March 2003 Memo at 45; August 2002 Memo at 6. Regardless, the Justice Department concluded that any limitations on an interrogator's conduct from either 18 U.S.C. § 2340 or the Convention Against Torture would be unconstitutional if the interrogation were authorized by the President acting under his Article II and Commander in Chief Powers: Congress "can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield." March 2003 Memo at 19; August 2002 Memo at 39.

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[10] *See* Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002) (the "August 2002 Memo").

Although these memoranda were later repudiated by the Justice Department,[11] they appear to have encouraged the government simply to avoid the constraints of the criminal process in favor of military custody with an attendant unbounded authority to isolate and interrogate al-Marri—indefinitely and often brutally.

What is more, there is substantial evidence that the Executive both solicited the issuance of the March 2003 Memo based on its author's previously accommodating conclusions regarding the lawfulness of interrogation practices and that, once issued, the government expressly relied upon its authorization to formulate an aggressive interrogation program for persons in Defense Department custody.[12] Specifically, on April 16, 2003, Secretary of Defense Donald Rumsfeld, ignoring vigorous opposition from senior military legal officers,[13] approved 24 of 26

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[11] *See* Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* 151 (2007). A number of commentators have criticized the memos' reasoning as a "one-sided justification for conferring legal immunity" on government actors. *See Restoring the Rule of Law: Hearing Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 110th Cong. 178 (2008) (joint statement of David J. Barron, Walter E. Dellinger, Dawn E. Johnsen, Neil J. Kinkopf, Martin S. Lederman, Trevor W. Morrison and Christopher H. Schroeder).

[12] S. Comm. on Armed Services, 110th Cong., *Inquiry Into the Treatment of Detainees in U.S. Custody, Executive Summary* ("Armed Servs. Summary") at xviii (2008).

[13] *See* Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* 226-236 (2008) (describing objections by Alberto Mora, General Counsel of the U.S. Navy, to interrogation methods being employed in Guantanamo and the subsequent decision-making process to formally sanction those methods which excluded

techniques which had been recommended by a "Working Group" of military and civilian government officials based on its review of the March 2003 Memo.[14] The techniques he approved—some of which the former General Counsel of the U.S. Navy considered "at a minimum cruel and unusual treatment, and, at worst, torture"[15]—included prolonged isolation, sleep deprivation, sensory deprivation and dietary manipulation.[16] A number of these techniques were employed on al-Marri.[17]

In devising these interrogation techniques, the Working Group did not operate on a blank slate. It borrowed heavily from a U.S. military program called Survival, Evasion, Resistance and Escape ("SERE"), initiated in order to train U.S. soldiers to resist the types of interrogation methods employed

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Mora and other concerned military officers); Memorandum from Alberto J. Mora to Inspector General, Department of the Navy, *Statement for the Record: Office of General Counsel Involvement in Interrogation Issues* ("2004 Mora Memo"), 18 n.12, (Jul. 7, 2004).

[14] Armed Servs. Summary at xii; *see also Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations* ("*Working Group Report*"), (Apr. 4, 2003), *available at* http://www.dod.mil/pubs/foi/detainees/-working_grp_report_detainee_interrogations.pdf.

[15] 2004 Mora Memo at 14.

[16] *See* Memorandum from Secretary of Defense to the Commander, US Southern Command, *Subject: Counter-Resistance Techniques in the War on Terrorism*, (Apr. 16, 2003), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.16.pdf. The Working Group had determined that all of these techniques had "high utility." *See generally, Working Group Report*.

[17] *See infra* at 15-19.

by Chinese Communists in the Korean War to induce false confessions.[18] Under the SERE training program, soldiers undergo aggressive interrogation techniques designed to "induce control, dependency, compliance and cooperation,"[19] most of which are "based on illegal exploitation (under the rules listed in the 1949 Geneva Convention Relative to the Treatment of Prisoners of War) of prisoners over the last 50 years."[20]

A U.S. airman explained that the harsh forms of isolation, control and humiliation to which his North Korean interrogators had subjected produced "a slow, quiet, diabolical" destruction of his mind.[21] And, even though they were considered unlawful when used against U.S. military personnel, many of those very same techniques were frequently employed in Guantanamo, and made their way to al-Marri's prison cell.[22]

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[18] Armed Servs. Summary at xiii; Mayer, *The Dark Side* 157-59 (describing genesis of SERE program and application to terrorist suspects in U.S. custody).

[19] *See* S. Comm. on Armed Services, 110th Cong., *Inquiry Into the Treatment of Detainees in U.S. Custody, Documents Referenced in Senator Levin's Opening Statement*, Tab 3, *Physical Pressures used in Resistance Training and Against American Prisoners and Detainees*, July 25, 2002, attached to July 26, 2002 Joint Personnel Recover Agency ("JPRA") Memorandum.

[20] Armed Servs. Summary at xiii (quoting a JPRA instructor).

[21] Mayer, *The Dark Side* 157.

[22] *See infra* at 15-19 (describing interrogation measures used on al-Marri). The Standard Operating Procedures ("SOPs") for Guantanamo were officially adopted for the U.S. Naval Brig in South Carolina, in which al-Marri and other domestically detained "enemy combatants" were held. *See* Pamela Hess, *U.S. Detainee Abuse Drove Prisoner to Brink of Insanity, New Documents Show*, Associated Press, Oct. 8, 2008 (describing

E. Application of Isolation and Interrogation Techniques Against Al-Marri

June 2003 to October 2004. Following al-Marri's designation as an "enemy combatant" in June 2003, the government confined him in nearly complete isolation inside the Naval Brig in South Carolina. *See* Certification of Andrew Savage, Esq. ("Savage Cert.") ¶ 3, Exhibit A to Plaintiff's Motion for Interim Relief, *Al-Marri v. Gates*, No. 2:05-2259-HFF-RSC (D.S.C. Mar. 10, 2008).[23] Ever since, al-Marri has been a "subject" in the isolation and interrogation program devised by the Defense Department and authorized by the Department of Justice.

For the first sixteen months of his confinement at the Brig, al-Marri was held entirely *incommunicado*, and denied any contact with the outside world, including his family, his lawyers and the International Committee for the Red Cross ("ICRC").

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contents of documents recently released by Department of Defense). Section 4-20 of those SOPs, entitled "Behavioral Management Plan" states: "The purpose of the Behavior Management Plan is to enhance and exploit the disorientation and disorganization felt by a newly arrived detainee in the interrogation process. It concentrates on isolating the detainee and fostering dependence of the detainee on his interrogator." Memorandum from Geoffrey D. Miller, Major General, U.S. Army, to All Personnel, *Approval of Camp Delta Standard Operating Procedures (SOP)* (Mar. 27, 2003), *available at* http://www.aclu.org/pdfs/safefree/gitmo_sop.pdf.

[23] The Savage Certification was filed in a separate litigation challenging the conditions of al-Marri's confinement and seeking equitable relief. The government has never answered these allegations so they remain undisputed.

Id. ¶ 6.[24] During this time, al-Marri was imprisoned in a six-foot by nine-foot cell in which he stayed for up to 24 hours a day. *Id.* ¶¶ 8, 10. To deprive al-Marri of natural light and any opportunity to see the outside world, his cell window was painted over in dark colors. *Id.* ¶¶ 11-12. The Brig staff also regularly denied al-Marri the most basic necessities, including adequate clothing and hygienic items. *Id.* ¶¶ 30-31. As his counsel later explained, "virtually every aspect of al-Marri's physical environment caused him disorientation, isolation, discomfort and sometimes pain." *Id.* ¶ 38. Al-Marri confessed to his attorneys that he "thought he was losing his mind." *Id.* ¶ 46. Al-Marri's account was corroborated by Naval Brig officers carrying out the Pentagon's interrogation program. *See* Pamela Hess, *Officer Wrote of Harsh Treatment of U.S. Detainee,* L.A. Times, Oct. 10, 2008, at A2 (reporting on documents disclosing that Naval Brig warned Pentagon officials that detainees, including al-Marri, were being "driven nearly insane by months of punishing isolation and sensory deprivation").[25]

In addition to imposing a regime of prolonged, total isolation, the government subjected al-Marri to dangerous and cruel interrogation measures, such as stress positions, prolonged exposure to extremely

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[24] In fact, his only human contact during that period was with the government interrogators and the prison guards who wore duct tape over their name badges and did not speak to al-Marri except to give him orders. Savage Cert. ¶ 7.

[25] Al-Marri's regime of isolation and interrogation mirrors that employed against Jose Padilla, which also caused Padilla to suffer significant psychological harm. *See* Motion to Dismiss Indictment for Outrageous Government Conduct, *U.S. v. Padilla*, No. 04-06001 (S.D.N.Y.).

cold temperatures, extreme sensory deprivation and threats of violence and death. Savage Cert. ¶¶ 23, 25, 27. On a number of occasions, interrogators stuffed al-Marri's mouth with cloth and sealed it with heavy duct tape, causing him serious pain; on one occasion this forced gagging procedure caused al-Marri to start choking. *Id.* ¶ 29. Interrogators reinforced this physical abuse with threats, promising for example, to send al-Marri to Egypt or Saudi Arabia where he would be tortured, sodomized and forced to watch his wife raped. *Id.* ¶ 25. They also threatened to make al-Marri "disappear" so that no one would know where he was. *Id.* ¶ 27.[26]

The government recorded hours of al-Marri's interrogations on videotape, but for unspecified reasons destroyed those recordings during the pendency of al-Marri's *habeas* proceedings; the recordings were reported to have corroborated al-Marri's accounts of abuse. *See* Mark Mazzetti and Scott Shane, *Pentagon Cites Tapes Showing Interrogations,* N.Y. Times, Mar. 13, 2008, at A1 (quoting anonymous government officials who recalled that destroyed tapes showed "rough treatment" and "manhandl[ing]" of al-Marri, including duct-taping his mouth).

The government also restricted al-Marri's ability to practice his faith. Savage Cert. ¶¶ 19-21. His interrogators denied him water to purify himself and

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[26] The government punished al-Marri when he failed to provide the information sought by his interrogators. On occasion and for days at a time, al-Marri was placed in a completely bare and cold cell for refusing to answer questions and denied his requests for extra clothing or a blanket. Savage Cert. ¶ 24.

a prayer rug to kneel on when praying; they also prohibited al-Marri from knowing the time of day or direction of Mecca, which prevented him from praying properly. *Id.* ¶¶ 20-21. The only religious item al-Marri was permitted was a Koran, and even this was often employed as a bargaining chip to facilitate interrogation. *Id.* at 20; *see also Carol D. Leonnig, Pentagon Report Cited Detention Concerns*, Wash. Post, Dec. 14, 2006, at A1 (describing Pentagon report documenting interrogators' efforts to deprive al-Marri "of sleep and religious comfort by taking away his Koran, warm food, mattresses and pillow as part of an interrogation plan approved by the high-level Joint Forces Command").

October 2004 to Present. In October 2004, several months after the Court's decision in *Hamdi*, the government finally permitted al-Marri to meet with counsel, though his initial access was monitored and severely restricted. Savage Cert. ¶¶ 6, 34-35. Having the opportunity to meet with his lawyer, however, did not alleviate the harsh conditions of his daily existence. On a number of occasions, al-Marri was confined to his cell for 24 hours a day, 7 days a week, for months at a time; the government also continued to deny al-Marri access to all external stimuli such as books or newspapers. *Id.* ¶¶ 10-12, 18.

In August 2005, al-Marri's counsel commenced an action challenging the conditions of his confinement. *Id.* ¶ 48. This alleviated some of the most punitive measures, but did not fundamentally alter the central operating principle of his confinement—prolonged isolation. *Id.* ¶ 54.

F. Al-Marri's Damaged Psychological Condition

After over 2000 days in the Brig, al-Marri suffers from many of the predictable psychological effects of his grim and desolate confinement. In March 2008, a prominent expert in the psychological effects of solitary confinement conducted an evaluation of al-Marri. The expert noted that the conditions under which al-Marri had been confined for years were more onerous than those endured by anyone he had observed other than "individuals who were incarcerated brutally in some third-world countries." Declaration of Dr. Stuart Grassian ("Grassian Decl.") at 15, Exhibit B to Plaintiff's Motion for Interim Relief, *Al-Marri v. Gates*, C/A 2:05-2259-HFF-RSC (D.S.C. Mar. 10, 2008).

According to the expert evaluation, al-Marri "clearly is suffering quite profoundly from increasingly severe symptoms related to his prolonged incarceration in solitary," including severe perceptual problems, increasing hypersensitivity to ordinary stimuli, and obsessive and paranoid thoughts. Grassian Decl. at 16-17. In addition to impairing al-Marri's ability to work with his lawyers, the continued stresses of his confinement may affect him "for a prolonged period of time, or even indefinitely." *Id.* at 17.

ARGUMENT

AL-MARRI'S DESIGNATION AND SUBSEQUENT DETENTION AS AN "ENEMY COMBATANT" WERE NOT AUTHORIZED BY THE AUMF OR THE LAWS OF WAR.

Relying on this Court's plurality opinion in *Hamdi*, the government has claimed that al-Marri's designation as an "enemy combatant" and subsequent detention outside the criminal process are authorized by the AUMF's delegation of power to the President. Specifically, the government defends al-Marri's indefinite detention on the grounds that it "is a simple war measure" necessary to "prevent his return to the battlefield."[27]

Amici agree fully with Petitioner's position that, whatever force and detention power the AUMF may have provided the Executive in conducting armed conflict abroad, the AUMF does not, and could not, specifically authorize the seizure and detention of U.S. citizens or others lawfully residing inside the U.S., thousands of miles from any armed conflict. Even if such a general authority could be found in the AUMF, however, the facts of al-Marri's designation as an "enemy combatant" and transfer out of the criminal justice system demonstrate that his potentially indefinite military detention was not a "necessary" or "appropriate" incident to the use of force.

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[27] Answer to Petition for Writ of Habeas Corpus 8, *Al-Marri v. Hanft*, No. 02:04-2257-26AJ (D.S.C.).

A. *Hamdi*'s Construction of the AUMF Authorized Detention Only Against a Limited Class of Persons and Under Limited Conditions.

The AUMF authorized the President to use "all necessary and appropriate force" against "nations, organizations, or persons" he determines were "associated with the September 11, 2001, terrorist attacks." *Hamdi*, 542 U.S. at 518 (plurality opinion). Applying standard canons of statutory construction, *see Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), *The Paquette Habana*, 175 U.S. 677, 700 (1900), the Court interpreted that authorization in accordance with the laws of war. *Hamdi*, 542 U.S. at 518. The Court thus concluded that the AUMF authorized force against the "limited category" of persons who "fought against the United States in Afghanistan," *Hamdi*, 542 U.S. at 518, a category into which the Court found Hamdi easily fell. *Id.* at 523 (referring to the "context of this case: a United States citizen captured in a foreign combat zone") (emphasis omitted); *id.* at 509 (describing allegation that Hamdi "took up arms with the Taliban during this conflict" in Afghanistan).

Although the AUMF does not expressly speak to the power to detain, the Court concluded that detention of the "limited category" of persons considered "for the duration of the particular conflict in which they were captured" is "so fundamental and accepted an incident to war" as to be a "necessary and appropriate" exercise of force permissibly delegated to the President. *Id.* at 518. That conclusion, in turn, expressly depended upon a "universal" understanding of the laws of war. *Id.*

(quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)). Under the laws of war, if one can lawfully use deadly force against a combatant, one can incapacitate him to prevent his "return to the field of battle" to "tak[e] up arms once again." *Id.*; *see also In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946).

At the same time, the Court emphasized that "[c]ertainly . . . indefinite detention for the purpose of interrogation is *not* authorized." *Hamdi*, 542 U.S. at 521 (emphasis added). The *Hamdi* plurality recognized that, in addition to limiting the purpose for which a person could be detained, the laws of war limit the conditions of detention. Accordingly, it coupled the congressional grant of power in the AUMF with the implicit, corresponding limits on the use of that power.

The Court observed that, on the one hand, holding a combatant in "protective custody" and treating him "humanely" is connected to the permissible purpose of preventing "further participation in the war." *Id.* (internal citations omitted). At the same time, the Court recognized that if a detention is motivated by "revenge," constitutes "punishment or an act of vengeance" or is not "devoid of all penal character," a detention would exceed the scope of the limited authority incorporated into the AUMF from the laws of war. *Hamdi*, 542 U.S. at 518 (quoting Yasmin Naqvi, *Doubtful Prisoner of War Status*, 84 Int'l Rev. Red Cross 571, 572 (2002) and William Winthrop, *Military Law and Precedents* 788 (rev. 2d ed. 1920)); *id.* at 521; *see also* Curtis A. Bradley and Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2095 (where

"an international law requirement . . . was a condition of the exercise of the particular authority," under the AUMF, a "violation of international law would negate a claim of implied authority under the AUMF"); Ryan Goodman and Derek Jinks, *Replies to Congressional Authorization: International Law, U.S. Powers and the Global War on Terrorism*, 118 Harv. L. Rev. 2653, 2660 (2005) ("[T]he power to detain is predicated, in many respects, on the treatment of detainees.").

The laws of war impose an additional limitation on the authority conferred by the AUMF: detention "may last no longer than active hostilities." *Hamdi*, 542 U.S. at 520 (citing Geneva Convention III (1955), Hague Convention II (1899), and Hague Convention IV (1907)). The Court acknowledged that the government's conception of the "war on terror" is "broad and malleable" and could potentially lead to "perpetual detention" of a kind unrecognized by the laws of war. That concern was not squarely presented in *Hamdi* because in 2004 when the case was decided, "active combat operations against Taliban fighters" were still ongoing. The Court cautioned, however, that if "the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war," the "understanding" that permits temporary detention "may unravel." *Hamdi*, 542 U.S. at 521.

Finally, the laws of war, and thus the AUMF, permit questioning of putative combatants, but any interrogation must be conducted "humanely" and voluntarily. *See Hamdi*, 542 U.S. at 521; Geneva Convention Relative to the Treatment of Prisoners of

War, ("Third Geneva Convention"), art. 17, Aug. 12, 1949, 75 U.N.T.S. 135 (prisoners of war "who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind").

Even though the government proclaims that al-Marri's detention is maintained in connection with an ongoing war, Congress has not issued the Executive a "blank check." *Cf. Hamdi*, 542 U.S. at 536; *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring). As such, the Executive cannot claim powers granted by the AUMF while simultaneously ignoring the limitations that Congress has placed on the use of those powers. *See Hamdi*, 542 U.S. at 550 (Souter, J., concurring in part and dissenting in part) (failure of Executive to abide by laws of war undermines its claim of authority under AUMF); *Hamdan*, 548 U.S. at 593 n.23 (2006) (President "may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers").[28]

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[28] *See also Little v. Barreme*, 6 U.S. 170, 177-78 (1804) (Marshall, C.J.) (where "act of Congress" authorizes president to seize ships sailing to French ports, "legislature seems to have prescribed the manner in which the law shall be carried into execution" to exclude seizures coming from French ports); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Clark, J., concurring) (reaffirming continuing vitality of *Barreme* principle, that president must abide by conditions implicitly set forth in statutory grants of power).

B. The Executive's Transfer of Al-Marri into Indefinite Military Detention for the Purpose of Interrogation Exceeded the AUMF'S Authorization for Detention of Combatants.

Even if the AUMF were construed to reach persons such as al-Marri, the government's actions in this case have exceeded any conceivable grant of authority from Congress. Congress did not authorize—and could not have authorized—either the Executive's evasion of Article III courts or its detention of al-Marri under conditions violating the laws of war.

1. Al-Marri's Transfer and Detention Were Not "Necessary" to Any Lawful Military Purpose.

Al-Marri's transfer into military custody cannot be considered "necessary" to any lawful military purpose under the AUMF. As described previously, *see supra* at 15-19, at the time that he was designated an "enemy combatant," al-Marri was entering his eighteenth consecutive month of detention in federal custody. Throughout al-Marri's custody he had been locked in solitary confinement. Moreover, the government was in the process of imposing SAMs, which it asserted would have limited his and counsel's ability to communicate any potentially harmful messages to the outside world. Further, al-Marri was soon to stand trial on charges that could have subjected him to imprisonment for thirty years. In addition, to the outstanding charges, the government had at its disposal a panoply of

federal counterterrorism laws with which to prosecute al-Marri.[29]

Manifestly, because al-Marri was already incapacitated by the criminal justice system and, if convicted, would have been subject to near lifetime imprisonment, his transfer into military custody added no additional—let alone "necessary"—protection against his potential "return" to a putative "battlefield."[30] And, despite the President's proclamation that al-Marri represented "a continuing, present, and grave danger to the national security of the United States," Pet. App. 467a, the government has yet to explain how any such threat could have materialized given al-Marri's solitary confinement inside a maximum security prison.

If al-Marri's military custody could be considered "necessary" under the AUMF or under some construction of the laws of war, then the military detention of *any* accused terrorist in criminal custody could be deemed necessary. Given the potentially unlimited duration of this asserted war against terrorism, accepting the government's theory would risk subjugating Article III courts to the whims of the Executive, which would be free to

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[29] *See* Richard B. Zabel and James J. Benjamin, *In Pursuit of Justice: Prosecuting Terrorism Cases in Federal Court* (2008).

[30] That al-Marri was removed from an ongoing criminal process starkly underscores the conclusion that he could not be considered a "combatant" under longstanding law-of-war principles. Military personnel typically capture combatants in a zone of active hostilities, not from inside a domestic prison cell.

employ or disregard those courts to its tactical advantage. *Cf. Reid v. Covert*, 354 U.S. 1, 30 (1957) (recognizing "the well-established purpose of the Founders to keep the military strictly within its proper sphere, subordinate to civil authority"); *Dow v. Johnson,* 100 U. S. 158, 169 (1879) ("The military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the Republic who advocates the contrary."); *Ex parte Milligan*, 71 U.S. 2, 124 (1866) (if courts permit the Executive to "substitute military force for and to the exclusion of the laws, and punish all persons, as [the executive] thinks right and proper, without fixed or certain rules . . . [then] republican government is a failure, and there is an end of liberty regulated by law").

This Court, however, has consistently placed limits on the Executive's asserted "necessity" to depart from baseline constitutional norms. In *Milligan*, the Court emphatically concluded that the President could not subject a citizen to military jurisdiction, regardless of his dangerousness or asserted military necessity, "where the courts are open and their process unobstructed." 71 U.S. at 121. The Court explained that "no reason of necessity could be urged" against the orderly procession of a criminal trial, "because Congress had declared penalties against the offences charged, provided for their punishment, and directed that court to hear and determine them." *Id.* at 122.

The Court further instructed, in terms equally applicable here, that the

> [G]overnment had no right to conclude that Milligan, if guilty, would not

> receive in that court merited punishment, for its records disclose that it was constantly engaged in the trial of similar offences, and was never interrupted in its administration of criminal justice.

Id.; *see also Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946) (narrowly construing statutory provision authorizing "martial law" in Hawaii so as not "to authorize the supplanting of courts by military tribunals"); *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (rejecting President's assertion of military necessity to seize domestic steel mills as part of war effort).

2. Al-Marri's Transfer, Continuing Detention and Conditions of Confinement Are Not "Appropriate" to Any Lawful Military Purpose.

It appears that the government transferred al-Marri to military custody following its request for, and the issuance of, misguided and subsequently revoked legal advice from the Office of Legal Counsel, which concluded that the Executive was not subject to any constitutional, statutory or treaty-based constraints on the detention of "enemy combatants"—even those detained inside the United States.[31] The transfer reflected a startlingly cavalier attitude toward our courts and criminal justice

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[31] *See supra* at 10-12.

system.[32] It appears to have been driven by an interest in denying al-Marri the opportunity to avail himself of an open justice system and subjecting him instead to a detention system designed to produce "dependency and trust" on his interrogators.[33] Indeed, by transferring al-Marri to military detention, the government condemned him to a regime of isolation and interrogation that bordered on, and sometimes constituted, torture.[34]

Al-Marri's detention has thus not been "appropriate" to the authorized goal of protective and humane incapacitation. Rather, it has constituted precisely the "inhumane," "vengeful," and "punitive" detention that is proscribed by the laws of war and the AUMF. *See Hamdi*, 542 U.S. at 518. In fact, al-Marri's detention contravenes the Court's decisions in both *Hamdi* and *Hamdan*. Not only did the Executive subject al-Marri to "long-term detention

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[32] *See supra* at 6-7 (describing reasons given by U.S. Attorney General for al-Marri's transfer out of criminal process). The recognition that courts have long been concerned about the deleterious effects of prolonged solitary confinement likely informed the preference of the government to move al-Marri out of the jurisdiction of, and potential remediation by, an Article III court. *See, e.g., Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988) ("[I]solating a human being from other human beings year after year or even month after month can cause substantial psychological damage."); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 914 (S.D. Tex. 1999) ("[T]he pain and suffering caused by extreme levels of psychological deprivation are equally, if not more, cruel and unusual than a lashing.").

[33] *See supra* at 8-9.

[34] *See supra* at 15-19. As Justice Frankfurter recognized, "There is torture of mind as well as body; the will is as much affected by fear as by force. And there comes a point where this Court should not be ignorant as judges of what we know as men." *Watts v. Indiana*, 338 U. S. 49, 52 (1949).

for the purpose of interrogation"—which the *Hamdi* Court concluded was "certainly" not authorized, 542 U.S. at 521—it subjected him to treatment inconsistent with Common Article 3 of the Geneva Conventions. *Hamdan*, 548 U.S. at 629-31 (Common Article 3 sets the baseline for humane treatment of all military detainees and is binding on the United States); *id.* at 642 (Kennedy, J., concurring) (observing that violations of Common Article 3 by U.S. officials constitute "war crimes" punishable as federal crime).

Moreover, even if the AUMF could be construed to apply domestically, Congress could not have meant to authorize treatment representing such a profound departure from the country's most fundamental constitutional norms. In the midst of an earlier global struggle against a committed military and ideological enemy, the Supreme Court stressed that only authoritarian states employ "unrestrained power to seize person[s] suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture." *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944). It vowed that, "[s]o long as the Constitution remains the basic law of our Republic, America will not have that kind of government." *Id.* at 155. *See also Padilla*, 542 U.S. at 465 (Stevens, J., dissenting) ("Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. . . . It may not . . . be justified by the naked interest in using unlawful procedures to extract information.").

Similarly, any assertion that al-Marri's detention resembles a "simple war measure" is fatally undermined by comparison with our international obligations, as well as a long history of U.S. policy and practice regarding the humane treatment of wartime detainees. The Geneva Conventions place strict limits on the methods and conditions of confinement,[35] as do long-standing U.S. military regulations.[36] Al-Marri's detention likewise stands in stark contrast to over 200 years of U.S. practice, which has always been to maintain the highest standards of military conduct, even in conflicts as precarious as that which purportedly compelled the detention and interrogation of al-Marri.[37] As such,

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[35] Third Geneva Convention, art. 17 (prohibiting any "form of coercion"); *id.* art. 25 (living conditions must be "as favourable as those for the forces of the Detaining Power who are billeted in the same area"); *id.* art. 13 (prohibiting "prolonged isolation"); *id.* art. 38 (requiring meaningful opportunities for exercise and time outdoors); *id* art. 72 (correspondence with family members); *id.* art. 34 ("complete latitude" for religious exercise).

[36] *See* U.S. Dep't Army, Field Manual, 34-52, 1-7 (prohibiting "use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind"); *id.* at 3-19.40, 4-60 (limiting segregation to no more than 30 days); *id.* at 3-19.40, 2-15, 2-18 (mandating full opportunity for worship and outdoor recreation); *see also* U.S. Dep't Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* § 3.4(e) (detainees "shall in no case" be subjected to conditions "prejudicial to their health.").

[37] *See, e.g.*, David Hackett Fischer, *Washington's Crossing* 113, 255 (2003) (describing General George Washington's insistence that British prisoners of war be treated "with humanity" despite brutal treatment American soldiers were enduring on British prison ships); General Orders No. 100: Instructions for the Government of Armies of the United States in the Field ("Lieber Code") § III, art. 56, 75 (April 24, 1863)

Congress could not have authorized such extra-legal and unprecedented conduct by the Executive.

* * *

This Court has an obligation to "promote confidence in the administration of justice [and] to preserve the judicial process from contamination." *Olmstead v. United States*, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting); *see also Sherman v. United States*, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring). In light of this Court's supervisory authority over the U.S. justice system and the troubling evidence of the government's desire to operate outside domestic and international law, *amici* urge this Court to reverse the Fourth Circuit's decision and thus avoid giving what might be seen as an imprimatur to the government's extra-legal conduct. "For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny." *Padilla*, 542 U.S. at 465 (Stevens, J., dissenting).

(Civil War era code proposing limitations on methods of interrogation and barring the "intentional infliction of suffering, or disgrace, by cruel imprisonment"); Joseph Margulies, *Guantanamo and the Abuse of Presidential Power* 74-75 (2006) (explaining that U.S. government treated prisoners of War during World War II and Korean War with "an almost compulsive regard for the Geneva Conventions" despite failure of enemy governments to reciprocally comply); George S. Prugh, *Law at War: Vietnam 1964-1973* 75-76 (1975) (describing policy of absolute compliance with POW protections for North Vietnamese prisoners).

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Court of Appeals for the Fourth Circuit.

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APPENDIX

Amicus **Human Rights Watch** ("HRW") is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, HRW seeks to raise the cost of human rights abuse and build pressure upon offending governments and others to end abuses. Human Rights Watch's terrorism and counterterrorism program documents abuses committed by terrorist groups and their supporters, and monitors counterterrorism laws, policies, and practices that infringe upon basic human rights.

Amicus **Center for Constitutional Rights** ("CCR") is a non-profit legal and educational organization dedicated to protecting and advancing the rights guaranteed by the U.S. Constitution and the Universal Declaration of Human Rights. CCR uses litigation proactively to advance the law in a positive direction, and to strengthen the broader movement for constitutional and human rights. As part of its advocacy on behalf of those whose civil, constitutional and human rights have been violated, CCR coordinates the representation of hundreds of individuals detained at the Guantánamo Bay Naval Station, and has twice brought the issue of the legality of their detention before this Court. *See Rasul v. Bush*, 542 U.S. 466 (2004); *Boumediene v. Bush*, 553 U.S. __ (2008).

Amicus **Physicians for Human Rights** ("PHR"), since 1986, has mobilized health professionals to advance the health and dignity of all people through action that promotes respect for human rights. PHR has been in the forefront of the global fight against torture and was one of the lead authors of the Istanbul Protocol on documenting torture adopted by the U.N. in 1999. PHR joins in this brief in support of constitutional principles and international instruments prohibiting torture.

Amicus **National Religious Campaign Against Torture** ("NRCAT") is a coalition of religious organizations committed to ending U.S.-sponsored torture and cruel, inhuman and degrading treatment. Since its formation in January 2006, over 240 religious groups have joined NRCAT, including representatives from the Roman Catholic, evangelical Christian, mainline Protestant, Unitarian, Quaker, Orthodox Christian, Jewish, Muslim, Buddhist, Hindu and Sikh communities. NRCAT's Statement of Conscience, endorsed by hundreds of religious organizations and tens of thousands of individuals declares that: "Torture violates the basic dignity of the human person that all religions, in their highest ideals, hold dear. It degrades everyone involved—policy-makers, perpetrators and victims. It contradicts our nation's most cherished values. Any policies that permit torture and inhumane treatment are shocking and morally intolerable."

Amicus **Islamic Society of North America** ("ISNA") was established in 1981 as an association of Muslim organizations and individuals that provides a common platform for presenting Islam, supporting

Muslim communities, developing educational, social and outreach programs, and fostering good relations with other religious communities, as well as with civic and service organizations. ISNA is a founding member of NRCAT and has been a consistent advocate for human rights for all persons.

Amicus **Evangelicals for Human Rights** ("EHR") is a project of NRCAT that seeks to articulate a compelling biblical case for a zero-tolerance stance on torture by any government for any reason, including the United States in its war on terror, and advocates for application of that commitment in the conduct of the war on terror. Founded in 2006, EHR focuses its education efforts on the evangelical community and seeks to reaffirm the centrality of human rights as an unshakeable biblical obligation fundamental to an evangelical Christian social and moral vision.

Amicus **The Advocates for Human Rights** is a non-profit organization dedicated to the promotion and protection of internationally recognized human rights. Founded in 1983, today The Advocates for Human Rights engages more than 800 active volunteers annually to document human rights abuses, advocate on behalf of individual victims of human rights violations, educate on human rights issues, and provide training and technical assistance to address and prevent human rights violations. The Advocates for Human Rights has a strong interest in ensuring that the United States construes its authority to detain persons in a way that is consistent with international human rights standards and to adhere to the United States' non-derogable obligation to never engage in torture.

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IN THE

Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,

Petitioner,

v.

DANIEL SPAGONE,
UNITED STATES NAVAL COMMANDER,
CONSOLIDATED NAVAL BRIG,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICI CURIAE MUSLIM ADVOCATES, THE SIKH COALITION, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, JAPANESE AMERICAN CITIZENS LEAGUE, AND SOUTH ASIAN AMERICANS LEADING TOGETHER IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are five civil rights, not-for-profit organizations firmly committed to the principle that this Country's freedoms must be afforded equally to every person in the United States of America.[2] Their interest in this case arises from the extraordinary detention power being asserted by the government. A decision by this Court upholding that power, *amici* submit, would pose an unwarranted threat to the civil liberties of citizens and lawful residents and

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. Sup. Ct. R. 37.3(a).

[2] Specifically, Muslim Advocates is a national legal advocacy and educational entity dedicated to protecting freedom, justice and equality for all, regardless of faith, and to promoting the full participation of Muslims in American civic life. The Sikh Coalition is a community-based organization that works towards the realization of civil and human rights for all people. The American-Arab Anti-Discrimination Committee is a civil rights organization committed to defending the rights of people of Arab descent and promoting their rich cultural heritage. Japanese American Citizens League, founded in 1929, is the nation's oldest and largest Asian American non-profit, non-partisan organization committed to upholding the civil rights of Americans of Japanese ancestry and others. South Asian Americans Leading Together is a national organization dedicated to fostering civic and political engagement by South Asians in the United States through a social justice framework that includes policy analysis and advocacy, community education, and leadership development.

visitors alike, one which history shows would leave minority and immigrant communities particularly vulnerable.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Ali Saleh Kahlah al-Marri, a national of Qatar, was arrested while lawfully present in the United States in December 2001 and later indicted on a number of federal criminal charges. A month before his criminal trial was scheduled to begin, the President declared al-Marri an "enemy combatant," the criminal charges against him were dismissed, and al-Marri was placed in military detention, where he has remained, uncharged and untried with respect to any crime, since June 2003.

Al-Marri challenges the government's claim that it can subject him to indefinite military detention without charge or trial. The government, in contrast, maintains that al-Marri is an "enemy combatant" and that, consistent with the Constitution, the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), ("AUMF")[3] authorizes al-Marri's detention based on

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[3] The AUMF permits the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." § 2(a), 115 Stat. 224.

the government's assertions that he is associated with al Qaeda and engaged or intends to engage in terrorist activities.

Although Petitioner currently is the only alleged "enemy combatant" detained on U.S. soil by the government under the claimed authority of the AUMF, the power asserted by the Executive and upheld by a majority of the Court of Appeals for the Fourth Circuit[4] knows no limiting principle. If sanctioned by this Court, that power could be used far more broadly as a means to hold indefinitely anyone whom the Executive suspects of having some connection to terrorism—including in cases where the asserted connection is much less substantial than what is publicly known about the accusations against al-Marri—without affording the detainee the protections provided by our criminal justice system, indeed without ever charging the detainee with any crime at all.

Amici are deeply concerned by the threat to civil liberty posed by this asserted power—and with reason. History offers examples of other societies that have responded to terrorist threats by establishing regimes of detention without trial analogous to the authority the government claims to possess under the AUMF. Much as the Founding Fathers perceived from their own experience with the English Crown, the lesson of this more recent experience teaches again that legal systems that

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[4] *Al-Marri v. Pucciarelli*, 534 F.3d 213, 216 (4th Cir. 2008) (en banc) (per curiam). A different majority of the court ruled that al-Marri had not been given sufficient process to challenge the President's enemy combatant determination. *Id.*

permit detention without charge or trial impose great costs on liberty: they result in the widespread detention of innocent people; they tend to be applied discriminatorily against racial, ethnic, religious or ideological groups; and they are closely associated with other abuses, such as the physical mistreatment and torture of detainees. There is no evidence, moreover, that such detention regimes are particularly effective, let alone successful, in combating or reducing terrorism, whereas there is solid ground to believe that they are counterproductive.

These lessons are not confined to examples from abroad; on occasion, when threatened by war or terrorist attack, this Nation, too, has put aside the individualized process that is the hallmark of our criminal procedure in favor of sweeping detention programs. The result, again, was to detain large numbers of innocent citizens and lawful residents; acute discrimination in the programs' application; and no discernible benefit to the Nation's security.

This historical record is directly relevant to the question of statutory interpretation now before this Court. It would be implausible and inappropriate to conclude that Congress silently authorized a system of domestic preventive detention without even pausing to consider or debate the serious abuses such systems repeatedly have entailed.

ARGUMENT

I. The Executive's Claimed Authority Represents An Extraordinary And Potentially Dangerous Departure From The Rule Of Law.

A. Detention Without Charge Or Trial Is An Extraordinary Departure From Traditional Criminal Procedure.

In our system of criminal justice, every citizen and lawful resident is entitled to certain fundamental elements of due process before the government may deprive him of his liberty: arrest only upon a showing of probable cause to believe that a crime has been committed; the right to have any serious criminal charge tried by a jury; and at trial, the right to confront his accusers and not be convicted absent proof beyond a reasonable doubt. *See, e.g., United States v. Marion*, 404 U.S. 307, 320 (1971) ("To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime."); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) ("The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause . . . ."); *Pointer v. Texas*, 380 U.S. 400, 404 (1965) ("The fact that th[e] right [of confrontation] appears in the Sixth Amendment . . . reflects the belief of the Framers . . . that confrontation was a fundamental right essential to a fair trial in a criminal prosecution."); *United States*

v. Gaudin, 515 U.S. 506, 510 (1995) ("We have held that [the Fifth and Sixth Amendments] require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.").

By determining that al-Marri is an "enemy combatant," the Executive traded detention pursuant to our criminal justice system—and all the protections that system affords—for indefinite military detention. From its founding, this Nation has recognized that detention in the absence of legal process is anathema to liberty and inconsistent with the rule of law.

> The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive. . . . "[I]f once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper . . . there would soon be an end of all other rights and immunities . . . ."

Hamdi v. Rumsfeld, 542 U.S. 507, 554–55 (2004) (Scalia, J., dissenting) (quoting 1 W. Blackstone, Commentaries on the Laws of England 131–33 (1765)); *see also* The Federalist No. 84 (Alexander Hamilton) ("[T]he practice of arbitrary

imprisonments, [has] been, in all ages, the favorite and most formidable instrument[] of tyranny.").[5]

Accordingly, this Court has held repeatedly that detention outside the traditional criminal process is an extraordinary measure, *see United States v. Salerno*, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."), and has permitted its use in only the most limited of circumstances, and then only with the benefit of other procedural safeguards. *See, e.g.*, *Hamdi*, 542 U.S. 507 (confinement of person who engaged in combat against United States during armed conflict abroad); *Salerno*, 481 U.S. 739 (pre-trial detention in criminal proceedings); *Schall v. Martin*, 467 U.S. 253 (1984) (detention of juveniles); *Addington v. Texas*, 441 U.S. 418 (1979) (commitment for mental health reasons); *O'Connor v. Donaldson*, 422 U.S. 563, 582–83 (1975) (Burger,

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[5] Although al-Marri may challenge the basis for his detention in a habeas corpus proceeding, that proceeding would be limited to a determination whether he meets whatever "enemy combatant" standard ultimately is deemed controlling, and would not provide several of the key constitutional safeguards that would be available to him in the criminal justice system. Habeas is not, nor is it intended to be, a substitute for criminal due process. *Rodman v. Pothier*, 264 U.S. 399, 402 (1924) ("[T]his court has uniformly held that the hearing on habeas corpus is not in the nature of a writ of error, nor is it intended as a substitute for the functions of the trial court.") (internal quotation marks omitted); *see also Ex Parte Tom Tong*, 108 U.S. 556, 559 (1883) ("[T]he judicial proceeding under [the writ of habeas corpus] is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act.").

C.J., concurring) (confinement for quarantine); *Carlson v. Landon*, 342 U.S. 524 (1952) (detention while immigration proceedings pending).

The government's military detention of al-Marri based on allegations of his "associations" and conduct, but without charging him with a crime, represents a dramatic departure from the traditional protections that all citizens and others lawfully resident here properly enjoy.

B. Experience Demonstrates That Legal Regimes That Permit Detention Without Charge Or Trial Are Susceptible To Grave Abuse.

The United States is not the only country that has met organized violence with the assertion of sweeping anti-terrorism powers. Other countries threatened by terrorism, including the United Kingdom (in Northern Ireland), India and Sri Lanka, have adopted regimes granting expansive powers of detention. Notably, in each of those countries, the detention power was expressly legislated, and the procedures for, and limitations on, such detention were set forth by statute. Despite those express limitations, the detention regimes in Northern Ireland, India, and Sri Lanka nevertheless gave rise to frequent and widespread abuses.[6]

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[6] Other jurisdictions as well could be cited to illustrate the same point—that detention without charge or trial is highly prone to abuse and tends to erode the rule of law wherever implemented. Insofar as the circumstances and legal responses of different societies will differ, however, we do not suggest that

Northern Ireland. The practice of indefinite, extra-judicial detention without trial has a well-documented history in twentieth-century Northern Ireland. Some form of internment or detention without trial was authorized by statute from shortly after the 1921 partition of Ireland continuously until 1998. *See* Daniel Moeckli, *The Selective "War on Terror": Executive Detention of Foreign Nationals and the Principle of Non-Discrimination*, 31 Brook. J. Int'l L. 495, 503 (2006).

Immediately after partition, the new Northern Ireland Parliament enacted the Civil Authority (Special Powers) Act (the "Special Powers Act"), which permitted the arrest and indefinite detention of "any person whose behaviour is of such a nature as to give reasonable grounds for suspecting that he has acted or is acting or is about to act in a manner prejudicial to the preservation of the peace or maintenance of order." Civil Authority (Special Powers) Act, 1922, 12 Geo. 5, c. 5, sched., reg. 23.[7] The Special Powers Act provided that any person so arrested could be indefinitely "detained in any of His

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the conditions reported here hold in equal degree across all such examples. We focus on Northern Ireland, India and Sri Lanka because all three are democracies, incorporate recognizable features of the Anglo-American legal tradition, and their responses to terrorist violence have been well-documented.

[7] The Special Powers Act was renewed frequently until 1933, when its provisions became permanent. *See* R. J. Spjut, *Internment and Detention Without Trial in Northern Ireland 1971–1975: Ministerial Policy and Practice*, 49 Mod. L. Rev. 712, 713 (1986).

Majesty's prisons . . . until he has been discharged by direction of the Attorney General or is brought before a court of summary jurisdiction." *Id.*

Internment was permitted under the Special Powers Act until 1972, when it was replaced by a detention regime under the Detention of Terrorists (Northern Ireland) Order (the "DTO"),[8] and then continued under the Northern Ireland (Emergency Provisions) Act (the "EPA")[9] and successor statutes, all of which authorized indefinite detention that was the practical equivalent of internment. *See* Laura K. Donohue, Counter-terrorist Law and Emergency Powers in the United Kingdom 1922–2000, at 132 (2001) ("[The DTO] sought to distinguish between internment and detention . . . . The acceptance of this distinction as being significant was far from widespread."); David R. Lowry, *Internment: Detention Without Trial in Northern Ireland*, 5 Hum. Rights 261, 293 (1976) ("Realizing the public animosity to internment, the [DTO] used the word 'detention' and nowhere mentioned the word 'internment' in an obvious attempt to sanitize the continued use of internment.").

The most notorious use of the internment power in Northern Ireland occurred from 1971 to 1975; in that period, roughly two thousand people were interned without charge (with many more

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[8] Detention of Terrorists (Northern Ireland) Order, 1972, S.I. 1632 (N.I. 15).

[9] Northern Ireland (Emergency Provisions) Act, 1973, c. 53.

arrested for potential internment, then released).[10] The widespread use of the internment power during the early 1970s gave rise to a host of serious abuses.

First, the internment power was used to detain large numbers of innocent people who were not involved in terrorism, in part because internment decisions frequently were made on the basis of incorrect and inadequate intelligence. *See* Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland ¶ 32 (1972) ("[W]hen internment was re-introduced in August 1971, the scale of the operation led to the arrest and detention of a number of persons against whom suspicion was founded on inadequate and inaccurate information."); Lowry, *supra*, at 267 ("[M]any innocent people were arrested and interned because of the lack of rapport with the community."); Spjut, *supra*, at 739 ("Defects in intelligence continued to result in the detention of innocent persons throughout the entire detention programme.").

The internment power in Northern Ireland also was applied discriminatorily. Internees were disproportionately members of the minority Catholic Nationalist community. *See* O'Connor & Rumann, *supra*, at 1678 (stating that of 1,981 persons

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[10] *See* Michael P. O'Connor & Celia M. Rumann, *Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland*, 24 Cardozo L. Rev. 1657, 1678 (2003) (stating that 1,981 persons were interned between August 1971 and December 1975); Spjut, *supra*, at App. (showing 2,157 persons interned during same period).

interned between 1971 and 1975, 1,874 were Catholic Nationalists and 107 were Protestant Loyalists); Spjut, *supra*, at 735 ("While Loyalists also perpetrated terrorist crimes H.M. Government used the DTO procedures against them belatedly and sparingly in comparison with its use against Republicans."); *see also* Spjut, *supra*, at 737–38 (discussing institutional biases in use of internment power).

In addition, while detained, internees were frequently subjected to physical abuse and coercive, violent interrogation. *See* Amnesty Int'l, A Report on Allegations of Ill-Treatment Made by Persons Arrested Under the Special Powers Act After 8 August, 1971 (1971), *available at* http://cain.ulst.ac.uk/events/intern/docs/amnesty71.htm (describing allegations including "severe beatings and physical tortures"); Donohue, *supra*, at 118–19 (recounting allegations of widespread ill-treatment of internees, including allegations that security forces "ma[de] them run barefoot over barbed wire and broken glass"); O'Connor & Rumann, *supra*, at 1679 ("The police subjected detainees to interrogation often comprising the use of the 'five techniques,' later branded as 'torture' and 'inhuman and degrading treatment' by the European Commission on Human Rights and Court respectively."); *see also* Lowry, *supra*, at 282 (noting that "many internees and ex-internees successfully prosecuted claims for damages" relating to conditions of detention).

Finally, despite the nominal protections offered by the administrative review procedures under the DTO and the EPA, the limited review

available proved largely illusory and offered internees no meaningful opportunity to challenge their detention. *See* Donohue, *supra*, at 165 ("The respondent's counsel could not cross-examine in great detail any evidence that was given, which was mainly hearsay. Much of it depended on information gained from paid informers who received sums of money and favours from the security forces. The informers themselves, however, did not attend the hearings."); Lowry, *supra*, at 305–06 (asserting that review of hearing process "reveals a slipshod, careless approach on behalf of the Crown and the Commissioners"; quoting lawyers involved as stating that hearings "ranged from 'farcical' or 'absurd' to, at best, 'useless'").

India. India has experienced more significant incidents of terrorism than perhaps any other country. Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20 Colum. J. Asian L. 93, 99–100 (2006); *see also* Arunabha Bhoumik, *Democratic Responses to Terrorism: A Comparative Study of the United States, Israel, and India*, 33 Denv. J. Int'l L. & Pol'y 285, 329 (2005) ("With over one hundred thousand casualties, terrorism has taken more lives in India than any other country."). In response, India's Parliament has enacted several major pieces of emergency legislation that utilize lengthy detention before, or in the absence of, charge or trial.[11] Two

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[11] The Indian Constitution, unlike our Constitution, grants the federal and state governments the power to enact detention laws in the interest of national or state security. *See* India

such Acts are the Terrorist and Disruptive Activities (Prevention) Act ("TADA")[12] and the Prevention of Terrorism Act ("POTA").[13] Kalhan et al., *supra*, at 141. Each of these Acts was condemned for the abusive manner in which it was applied, and each has since been repealed.[14]

TADA was enacted in 1985, in response to an extended period of violence in Punjab after the assassination of Prime Minister Indira Gandhi. Kalhan et al., *supra*, at 145. It defined, and permitted the state prosecution of, a number of terrorism-related offenses. *Id.* Until it lapsed in 1995, however, TADA was "predominantly used not

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Const., Sched. 7, List I, Entry 9 (Central Government Powers); *id.* List III, Entry 3 (Concurrent Powers).

[12] Terrorist and Disruptive Activities (Prevention) Act, No. 31 of 1985. Originally expected to expire after two years, the legislature re-enacted TADA in 1987 for another six years. *See* Terrorist and Disruptive Activities (Prevention) Act, No. 28 of 1987; Manas Mohapatra, Comment, *Learning Lessons from India: The Recent History of Antiterrorist Legislation on the Subcontinent*, 95 J. Crim. L. & Criminology 315, 329 (2004).

[13] Prevention of Terrorism Act, No. 15 of 2002.

[14] Following the November 2008 terrorist attacks in Mumbai, India's Parliament swiftly approved new anti-terrorist legislation that, among other things, empowers police to detain suspects for up to 180 days without charge. Rama Lakshmi, *Anti-Terror Bills Advance in India*, Wash. Post, Dec. 18, 2008, at A21. India's President signed the bill into law on December 31, 2008. *Indian President Approves Anti-Terror Law*, CBS News, Jan. 2, 2009, *available at* www.cbsnews.com/stories/2009/01/02/ap/asia/main4695741.shtml.

to prosecute and punish actual terrorists," but "as a tool that enabled pervasive use of preventive detention and a variety of abuses by the police, including extortion and torture." *Id.* at 146–47; *see also id.* at 147 ("TADA's provisions consistently were used in an arbitrary and discriminatory manner to target political opponents, religious minorities . . . and other lower caste groups . . . ."); Mohapatra, *supra*, at 331 ("[T]he actual result of [TADA] was widespread abuse as its broad definition of terrorism was used to crack down on political dissidents . . . and was used in some regions exclusively against religious and ethnic minorities."). Between 1987 and 1995, TADA was used to "put 77,000 people in prison," of which only 8,000 eventually were tried for terrorist activities and only two percent ultimately were convicted. *See* Amnesty Int'l, India: Report of the Malimath Committee on Reforms of the Criminal Justice System: Some Observations 22 (Sept. 19, 2003) (referring to the conviction rate under TADA as "abysmally low").

Like TADA, POTA was enacted in response to specific incidents of terrorism—in this instance, the attacks on the legislative assembly of Jammu & Kashmir in October 2001 and on the Indian Parliament building in December 2001. Kalhan et al., *supra*, at 152. Abuses committed under the authority of POTA began almost immediately after the statute's enactment in March 2002 and continued unabated thereafter; on one day in February 2003, POTA was used to detain over 330 people in two different states—200 for allegedly supporting Communism and 130 Muslims for allegedly attacking Hindus. Human Rights Watch,

In the Name of Counter-Terrorism: Human Rights Abuses Worldwide 16 (Mar. 25, 2003) (hereinafter Human Rights Watch Report). "[H]undreds of questionable and prolonged detentions with no formal charges filed" have been attributed to POTA. Chris Gagne, *POTA: Lessons Learned from India's Anti-Terror Act*, 25 B.C. Third World L.J. 261, 264 (2005). Furthermore, like TADA, "[a]dministration of POTA . . . varied widely across the country, resulting in arbitrary and selective enforcement against members of . . . minority communities . . . and police misconduct and abuse, including torture." Kalhan et al., *supra*, at 173; *see also* Human Rights Watch Report, *supra*, at 15 (documenting numerous incidents of POTA's use against political opponents and racial, ethnic, and religious minorities). In response to complaints of abuse, Parliament repealed POTA in 2004.[15] Mohapatra, *supra*, at 335.

Sri Lanka. Prolonged detention without charge in Sri Lanka is authorized by a set of Emergency Regulations, enacted pursuant to the Public Security Ordinance of 1947 ("PSO"),[16] and the Prevention of Terrorism (Temporary Provisions) Act of 1979 ("PTA").[17] Section 5 of the PSO, part II, permits the President to proclaim a state of emergency "in the interest of public security and the

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[15] Even after POTA's repeal, the law continued to apply in limited circumstances. Kalhan et al., *supra*, at 153.

[16] Public Security Ordinance, No. 25 of 1947.

[17] Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979.

preservation of public order." Deepika Udagama, *Taming of the Beast: Judicial Responses to State Violence in Sri Lanka*, 11 Harv. Hum. Rts. J. 269, 277 (1998); *see also* Radhika Coomaraswamy et al., *Rule by Emergency: Sri Lanka's Postcolonial Constitutional Experience*, 2 Int'l J. Const. L. 272, 276 (2004). Violent clashes among the Sri Lankan government, the Janatha Vimukthi Peramuna, a Marxist political party, and the Liberation Tigers of Tamil Eelam ("LTTE"), an extremist Tamil nationalist organization, have subjected Sri Lanka to more years of emergency rule than of democratic governance. Coomaraswamy et al., *supra*, at 274–76; Udagama, *supra*, at 272–74.

In times of emergency, the President "usually enacts a set of regulations entitled the Emergency (Miscellaneous Provisions and Powers) Regulations (EMPRR)." Coomaraswamy et al., *supra*, at 278. The regulations typically authorize the Defense Secretary to order a suspect's detention "in order 'to prevent a person from engaging in acts inimical to national security . . . .'" Udagama, *supra*, at 279 (quoting EMPRR No. 17, Gazette No. 563/7 (June 20, 1989)).[18] Pursuant to a 2008 amendment, a suspect may be detained for eighteen months before he must be produced before the courts. Human Rights Watch, World Report 2009 – Sri Lanka (Jan. 14, 2009) (hereinafter Sri Lanka 2009 World Report). The Defense Secretary need only be "of [the] opinion"

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[18] *See also* EMPRR No. 19, Gazette No. 1405/14 (Aug. 13, 2005) (authorizing the Defense Secretary to detain a suspect "to prevent[] such person from acting in any manner prejudicial to the national security or to the maintenance of public order").

that detention is necessary. EMPPR No. 19, Gazette No. 1405/14. The most recent incarnation of the regulations was enacted in August 2005, following the assassination of a Sri Lanka foreign minister (after a brief respite during the 2002 ceasefire between the government and LTTE), and remains in effect today. Amnesty Int'l, Sri Lanka: Silencing Dissent 9 (Feb. 7, 2008).

The PTA was enacted in 1979 as a temporary measure "to eliminate threats to a unified Sri Lanka," and became a permanent measure in 1982. Coomaraswamy et al., *supra*, at 275–76. Section 9 of the PTA permits a minister to order the detention of a suspect for up to eighteen months without judicial oversight if he "has reason to believe or suspect" that the detainee is involved in unlawful activity. Udagama, *supra*, at 276. An order under § 9 is "final and conclusive and cannot be questioned in any court or tribunal." *Id.*

Together, the emergency regulations and PTA have resulted in widespread incidents of "arbitrary arrests and incommunicado detentions." Udagama, *supra*, at 279. "From January to November 2000 alone, approximately 18,000 people were arrested under emergency regulations or the [PTA]" and were detained for over two years without trial. Coomaraswamy et al., *supra*, at 284. Detention has been associated with disappearances, torture, and extra-judicial killings. *Id.* at 291; *see also* N. Monaharan, East-West Center, Counterterrorism in Sri Lanka: Evaluating Efficacy 33 (2006) (stating that the broad discretion afforded security forces under the regulations has normalized disappearances); Amnesty Int'l, Sri Lanka, New

Emergency Regulations – Erosion of Human Rights Protections (July 1, 2000) (noting that, following amendment of the detention regulation in 2000, reports of torture increased, and the methods of reported torture became more severe).[19] Evidence further shows that these laws are applied disproportionately against minorities and political opponents of the government: for example, although Tamils are only 16% of the overall population, in 2007, the "overwhelming majority" of the victims of human rights violations such as arbitrary arrest and detention, killings, disappearances and torture "were young male Tamils." U.S. Dep't of State, Sri Lanka: Country Reports on Human Rights Practices 2007 (Mar. 11, 2008); *see also* Sri Lanka 2009 World Report, *supra* (stating that the government "uses the [emergency] regulations to arrest and detain political opponents . . . and members of the Tamil minority community"); Udagama, *supra*, at 277 (discussing the PTA's use against Tamils and the government's political opponents).

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[19] Although Amnesty International was careful to note there is no "conclusive evidence" linking the amendment of the regulations with the increased reports of torture, it also noted that "[o]ne of the most basic safeguards against torture and 'disappearance' is to ensure that no prisoners are held for long periods of time in the custody of those responsible for their interrogation and that they have access to their relatives, lawyer and a doctor." *Id.*

II. The Authority To Detain Claimed By The Executive Has Not Been Effective In Combating Terrorism And May Instead Be Counterproductive.

A. Foreign Legal Regimes That Permit Detention Without Charge Or Trial Have Not Enhanced Security.

As the experiences of Northern Ireland, India and Sri Lanka demonstrate, legal regimes that permit lengthy detention without charge or trial are susceptible to serious abuses. If such measures were proven effective in reducing terrorism, it might be questioned whether the societal costs (in terms of the erosion of due process protections) were at least mitigated by the benefits of living in more secure and less violent societies. There is little or no evidence, however, that regimes permitting prolonged or indefinite detentions without charge or trial actually are effective in preventing terrorism. On the contrary, these regimes may even *contribute* to greater violence.

Northern Ireland. The use of the internment power in Northern Ireland proved ineffective in its ostensible aim of reducing terrorism and political violence in several ways.

Evidence indicates that the use of internment actually *strengthened* terrorist organizations by bolstering support for the Irish Republican Army ("IRA") among Catholics and aiding the IRA in its efforts to recruit new members. *See* O'Connor & Rumann, *supra*, at 1680 ("[T]he brutal internment of family members was frequently identified as critical to the decision to join outlawed paramilitary

organizations."); Lowry, *supra*, at 267 ("[T]he hostility engendered by counter-terror tactics made the Catholic ghettos a safe haven for the Provisional I.R.A."); Philip A. Thomas, *September 11th and Good Governance*, 53 N. Ir. Legal Q. 366, 385 (2002) (quoting British MP during Parliamentary debate on 1998 bill revoking internment power: "Frankly it has not worked . . . we believe that the use of internment would strengthen the terrorists."). In addition, many internees emerged from the experience more "politicized and radicalized" than before their detention. Lowry, *supra*, at 276; Donohue, *supra*, at 166 ("[T]hose held in prisons became increasingly sympathetic to anti-government paramilitary activity.").

Equally significant, internment also led to a marked decline in the legal system's legitimacy: "Because the judicial process and the protections it provides were unavailable to internees, who were overwhelmingly chosen from the minority community, the judicial process itself became tainted and compromised." O'Connor and Rumann, *supra*, at 1680–81; Donohue, *supra*, at 166 (stating that conduct of internment policy "placed the system in disrepute," and noting that "[e]ven loyalists" were "appalled" by the detention system).[20] This distrust,

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[20] Reviewing the use of emergency legislation during the internment period, Lord Gardiner observed that the administrative review process was "not perceived as being just by members of the general public." Report of a Committee to Consider, in the Context of Civil Liberties and Human Rights, Measures to Deal with Terrorism in Northern Ireland ¶ 145 (1975).

in turn, rendered longstanding sectarian disputes in Northern Ireland more resistant to political negotiation and compromise. Lowry, *supra*, at 323 ("It would be an understatement to say that internment has produced a degree of alienation in the minority community which could make an agreed political solution at best unworkable . . . .").

Moreover, it is now widely recognized that the internment power not only failed to reduce or prevent violence, but likely exacerbated political violence in Northern Ireland. Almost immediately after internment was reintroduced in August 1971, incidents of terrorism rose dramatically. *See* Thomas, *supra*, at 385 ("Internment was introduced in 1971 when 27 people were killed in the first eight months of that year. In the following four months, after bringing in that power, 147 people were killed."); Spjut, *supra*, at 716 ("[T]he number of explosions increased from 79 in July [1971] to 142, 186, 155, 117 and 123 in August to December."). Terrorist violence reached historic levels in 1972, and the annual death toll in Northern Ireland remained elevated through the entire period of internment, subsiding only in 1977, after internment was discontinued. *See* Brendan O'Duffy & Brendan O'Leary, *Violence in Northern Ireland, 1969-June 1989*, *in* The Future of Northern Ireland, App. 3 (John McGarry & Brendan O'Leary eds., 1990).

India and Sri Lanka. Both the Indian and Sri Lankan experiences illustrate the cycle of futility that can be set in motion when countries even more beset by terrorism than is the United States respond by implementing detention regimes that are prone to overly broad, discriminatory and harsh application.

In India, this cycle has played out in a series of terrorist incidents, followed by stringent legislation that spawns abuse, repeal in the face of popular outrage and then, ultimately, re-enactment—all without abating violence. *See* Kalhan et al., *supra*, at 105–06 (describing the pattern). India's Parliament originally passed TADA in response to a particularly violent period during the early 1980s. *Id.* at 145. When TADA failed to reduce terrorist activity, Indian lawmakers amended and strengthened the law. Mohapatra, *supra*, at 330. In light of its rampant abuse, TADA was permitted to lapse in 1995, but was followed by the newer, even more stringent, POTA in 2001 after terrorist attacks on India's Parliament. *Id.* at 333. Again, in the face of criticism, POTA was repealed in 2004, only for many of its policies to be resurrected in the form of revisions to the Unlawful Activities (Prevention) Act ("UAPA")[21] after the 2008 bombing in Mumbai.

Today, the same debate surrounding earlier anti-terrorist legislation is being repeated with respect to the UAPA: one lawmaker has argued that the perpetrators of the Mumbai attacks "forced" the government to respond with strong anti-terror laws, and that the passage of the UAPA was proof that "objections to POTA were spurious and measures taken by the government still are not strong enough." Nagendar Sharma, *Won't Allow Misuse of Terror Law: PC*, Hindustan Times, Dec. 19, 2008. Human rights organizations and other Indian

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[21] Unlawful Activities (Prevention) Amendment Act, No. 35 of 2008.

leaders, on the other hand, have expressed concern that the new law's powers of detention vest overbroad authority in the government. *See, e.g.*, Lakshmi, *supra* (quoting Indian lawmaker discussing UAPA that "[d]emocracy must not be impaired while fighting terrorism"); Amnesty Int'l, India: New Anti-Terror Laws Would Violate International Human Rights Standards (Dec. 18, 2008) (calling for India's president to reject the new law, citing its potential to violate human rights).

Similarly, although Sri Lanka has been under emergency rule almost continuously since its independence in 1947, and its anti-terrorism law (the PTA) has been in place since 1979, there has been no discernible or lasting decrease in violence. Rather than preventing violence, the combination of emergency rule and the PTA has "achieved the counterproductive result of fueling the increasingly violent Tamil movement for an independent state." Coomaraswamy et al., *supra*, at 276; *see also* Amita Shastri, *Government Policy and the Ethnic Crisis in Sri Lanka*, *in* Government Policies and Ethnic Relations in Asia and the Pacific 129, 153 (Michael E. Brown & Sumit Ganguly eds., 1997). During the 1980s and 1990s, "[t]he government relied heavily on its emergency powers to harass and detain Tamil insurgents. This, of course, led to even more Tamil hostility." Shastri, *supra*, at 153. Escalating Tamil hostility predictably prompted harsher laws. Coomaraswamy et al., *supra*, at 276 (noting that advances by the LTTE "corresponded" with "the severity of emergency rule"). This cycle of violence followed by repressive legislation was repeated following the assassination of a Sri Lankan foreign

minister and the reinstatement of emergency rule in 2005—which led to a host of human rights violations, including arbitrary arrest and detention torture, disappearances, and unlawful killings. *See, e.g.*, U.S. Dep't of State, Sri Lanka: Country Reports on Human Rights Practices 2005 (Mar. 8, 2006).

B. Domestic Experience Further Highlights The Risks And Inefficacy Of Detention Without Charge Or Trial

Al-Marri's indefinite military detention is premised on the Executive's determination that he is an "enemy combatant" within the meaning of the AUMF. If the government's construction of its authority under the AUMF is upheld, the Executive will be able to detain *anyone*, possibly for life, based on the detainee's claimed association with the "enemy" and the asserted risk to the United States that his freedom poses, without any corresponding requirement to prove criminal wrongdoing in the way that our system normally requires. And while al-Marri is as yet the only such detainee, once the government is granted this power to detain without formal charge or trial, its exercise undoubtedly will prove irresistible in terrorism-related cases where the evidence is weak, or prosecution problematic, or some other inconvenience stands in the government's way. *Cf. Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) ("The principle . . . lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need.").

As our own history indicates, detentions outside of ordinary criminal processes readily lend themselves to being applied in an arbitrary and discriminatory manner, with dire consequences for the affected communities and without advancing the ultimate goal of preventing terrorism. The most recent episode followed the attacks of September 11, and therefore would not have been considered by the Congress that enacted the AUMF. The earlier one, involving the detention of persons of Japanese ancestry during World War II, however, has left a deep scar on our Nation's history, one that renders unimaginable the suggestion that Congress would have authorized a broad new domestic detention power without considering its potential implications.

Following the events of September 11, 2001, the United States undertook a large-scale detention campaign targeted at immigrants, particularly Muslims, South Asians and Arabs. *See* Office of Inspector General, Dep't of Justice, The September 11th Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of September 11 Attacks 14, 20–23 (April 2003) (hereinafter OIG Report) (identifying detainees as almost exclusively men, aged 26 to 40, predominantly from Pakistan, Egypt, Iran, and Afghanistan). "Within 2 months of the attacks, law enforcement authorities had detained . . . more than 1,200 citizens and aliens nationwide"; some were released after questioning, but some were subjected to "a pattern of physical and verbal abuse," that included "racial slurs and threats" and aggressive mistreatment at the hands of detention officers. *Id.* at 1, 142–44.

The detention of Muslims, Arabs, and South Asians after September 11 has been condemned as both arbitrary and discriminatory. In a study of the immigration detentions that took place in New York immediately following September 11, the OIG determined that in carrying out the detentions, the FBI and INS had made "little effort" to distinguish between detainees who were tied to terrorism and those who had been encountered by chance, and that the procedures used to determine which persons were of "high interest" were inconsistent and imprecise. *Id.* at 69. The OIG found also that Muslims were detained irrespective of any link to terrorism. *Id.* at 158. Indeed, "[g]overnment officials now acknowledge that virtually all of the persons that it detained shortly after 9/11 had no connection to terrorism." *See* Justice for All – A Nationwide Public Forum on Selective Enforcement After September 11, 2001 Before Sens. Edward M. Kennedy and Patty Murray (June 4, 2003) (written testimony of American Civil Liberties Union).

The ineffectiveness of that detention campaign in identifying terrorists is not surprising. As noted by Clark Kent Ervin, former Inspector General of the Homeland Security Department, it "is illogical" to be more suspicious of Arabs, "because the chance that any given Arab is a terrorist is only marginally greater than the chance that anybody else is a terrorist." Clark Kent Ervin, *The Usual Suspects*, N.Y. Times, June 27, 2006, at A1. Basing detention decisions on a racial or ethnic profile also wastes valuable resources and encourages lazy

policing.[22] Overwhelmed by the large number of suspects captured within its broad net, law enforcement will expend valuable time and resources questioning and detaining innocent persons.[23]

Furthermore, focusing suspicion on those who fit a particular profile may cause law enforcement to overlook truly dangerous persons. Terrorist organizations have many allies who may not fit the government's apparent profile. *See, e.g.*, Ervin, *supra* (citing 2004 conviction of Earnest James Ojaama, "a Seattle-born black convert to radical Islam" alleged to have provided material to the Taliban, and John Walker Lindh, the "white 'American Taliban'"); *see also* Bill Dedham, *Memo*

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[22] *See e.g., Peter DiDomenica Discusses Counterterrorism Measures*, Nat'l Pub. Radio, July 30, 2005 (quoting Massachusetts police sergeant and airport screening trainer that "We do not target people based on apparent race or ethnicity. We feel that use of race . . . [is] counterproductive, . . . wastes valuable resources and it also causes ill will with the particular community that is a victim . . . ."); Am. Civil Liberties Union, Sanctioned Bias: Racial Profiling Since 9/11 8 (Feb. 2004) (quoting Texas law enforcement officer that racial profiling "is a lazy method for law enforcement. You're not using investigative leads . . . all you're doing is casting a wide net against one . . . segment of society, and that's what we call 'going fishing' . . . .").

[23] *See* David A. Harris, *New Risks, New Tactics: An Assessment of the Re-Assessment of Racial Profiling in the Wake of September 11, 2001*, 2004 Utah L. Rev. 913, 928 (2004) ("Adding large numbers of people to the suspect pool who are overwhelmingly unlikely to have anything to do with terrorism will not improve our chances to find the bad guys; on the contrary, it will overwhelm the system with people who present no real risk . . . .").

Warns Against Use of Profiling as Defense, Boston Globe, Oct. 12, 2001, at A27 (discussing memo circulated by senior U.S. intelligence specialists to American law enforcement agents worldwide, which warned against relying on an individual's characteristics, rather than behavior, in assessing potential threats).[24]

Of course, the most extreme example of detention outside of the criminal process in the United States was the internment of more than 120,000 persons of Japanese ancestry on the West Coast during World War II. *See* Comm'n On Wartime Relocation And Internment Of Civilians, Report: Personal Justice Denied, Summary (1983). The government justified the exclusion by asserting that there were "indications that [Japanese-Americans] were organized and ready for concerted action at a favorable opportunity. The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken." *Id.* (quoting General John L. DeWitt, Commanding General of Western Defense Command). In the end, "not a single documented act of espionage, sabotage or fifth column activity was committed by an American citizen of Japanese

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[24] *See also* Fed. Bureau of Investigation, Countering Terrorism: Integration of Practice and Theory 27 (Feb. 28, 2002) (warning that "[t]here is some risk in the manner in which people from Muslim- and Arab- communities appear to have been targeted for intensive and continued scrutiny" post September 11, because "most people with [the profile] characteristics are not terrorists" and "there is a real danger of ignoring other people who do not have these characteristics [but] may actively support or participate in terrorist acts").

ancestry or by a resident Japanese on the West Coast." *Id.*

The legal foundation for the Japanese internment was Executive Order 9066, a sweeping pronouncement by the President, later "ratified" by Congress, that was interpreted to permit the military to impose curfews, exclusion, internment and relocation on persons of Japanese descent. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942); *see also Hirabayashi v. United States*, 320 U.S. 81, 91, 104–05 (1943) (stating that Executive Order 9066 was "ratified and confirmed" by March 21, 1942 Act of Congress, 56 Stat. 173; rejecting challenge to curfew order issued pursuant to Executive Order 9066).

The Japanese internment has now been universally repudiated, *see, e.g., Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 236 (1995), and the United States has formally apologized and granted reparations to the survivors. In 1971, as part of the bill repealing the Emergency Detention Act of 1950, Congress enacted 18 U.S.C. § 4001(a), which states that "[n]o person shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." *See Hamdi*, 542 U.S. at 517. In passing § 4001(a), "Congress was particularly concerned about the possibility that the [Emergency Detention] Act could

be used to reprise the Japanese-American internment camps of World War II." *Id.*[25]

Given our Nation's shameful past experience with the standard-less grant of broad detention powers outside the criminal process, and in light of § 4001(a), it simply is not reasonable to conclude that Congress would reauthorize indefinite domestic detention without trial *sub silentio* through the AUMF, which nowhere mentions the power to detain persons lawfully resident in this country.

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[25] The House Judiciary Committee Report accompanying the bill is strikingly relevant to the Executive's claimed authority in this case:

> [T]he constitutional validity of the [Emergency Detention] Act is subject to grave challenge. The Act permits detention of each person as to whom there is a reasonable ground to believe that such person probably will engage in, or probably will conspire with other to engage in, acts of espionage or of sabotage. This criterion would seem to violate the Fifth Amendment by providing imprisonment not as a penalty for the commission of an offense, but on mere suspicion that an offense may occur in the future.

H.R. Rep. No. 92-116 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435, 1438.

C. Sacrificing The Rule Of Law Alienates Domestic Communities And International Allies Whose Help Is Needed.

Detention without charge or trial not only is ineffective in actually identifying terrorists and preventing terrorism; the departure from the rule of law that it signals may actually undermine law enforcement's efforts in this vital area.

The government's ability to instill trust in, and foster relationships with, key communities is vital to its public safety mission. *See, e.g.*, Police Executive Research Forum, 2 Protecting Your Community From Terrorism: Strategies for Local Law Enforcement: Working with Diverse Communities 26 (2004) ("Diverse communities . . . may well be willing to work with investigators who they believe will respect their privacy, their traditions and act responsibly to keep terrorists out of their communities."); Nicole J. Henderson et al., Vera Inst. Of Justice, Law Enforcement & Arab Community Relations After September 11, 2001: Engagement in a Time of Uncertainty 17 (2006) (quoting one police chief as recognizing that "[T]he collection of intelligence will come from the community. So a relation of trust and confidence with the [Arab American] community is important . . . . We can't afford to alienate them. Otherwise, we cut off our sources of information."); *Threat of Islamic Radicalization to the Homeland: Hearing Before the S. Comm. On Homeland Security and Governmental Affairs*, 110th Cong. 3 (March 14, 2007) (written testimony of Daniel Sutherland,

Officer for Civil Rights and Civil Liberties, U.S. Department of Homeland Security) (hereinafter Sutherland Testimony) ("We believe that a critical element of our strategy for securing this country is to build a level of communication, trust, and confidence . . . .").

The arrest and indefinite detention of persons outside of the ordinary criminal process, particularly when perceived to be based on the ethnic or religious orientation of the detained, will hinder terrorism prevention efforts because it "sends a message that law enforcement has targeted a whole community as 'alien' or 'suspect.'" David Cole, *Enemy Aliens*, 54 Stan. L. Rev. 953, 986 (2002). Sending that message "cannot help but alienate members of the targeted community, rendering them far less likely to assist law enforcement in their efforts to identify true perpetrators." *Id.*; *see also* Kalhan et al., *supra*, at 101–02 ("Alienated communities are also less likely to cooperate with law enforcement, depriving the police of information and resources that can be used to combat terrorism."). The consequences can be serious, considering that these communities could be particularly helpful to law enforcement in its terrorism-prevention work.

This erosion in the trust and confidence of immigrant communities was precisely what the widespread detention of Muslim, Arab and South Asian citizens, aliens and immigrants achieved in the aftermath of September 11. "[T]he nationality-based information and detention sweeps of the past two years have taken a serious toll on immigrant communities in the United States. Arab and Muslim organizations describe the 'chilling effect' that these

programs have had on community relations . . . . [T]hese blanket immigration measures have alienated the very communities whose intelligence and cooperation is needed most." Lawyers Comm. For Human Rights, Assessing the New Normal, Liberty and Security for the Post-September 11 United States 31 (2003) (hereinafter Lawyers Comm. Report). Similarly, Vincent Cannistraro, former Director of Intelligence Programs for the National Security Council under former President Reagan, has written that "the Justice Department's detention of thousands of immigrant Muslims—the policy of 'shaking the trees' in Islamic communities—alienates the very people on whom law enforcement depends for leads and may turn out to be counterproductive." Vincent Cannistraro, *The War on Terror Enters Phase 2*, N.Y. Times, May 2, 2002, at A1; *see also* Harris, *supra*, at 933–34 (noting that the investigation of now-convicted terrorist suspects began based on tips contained in a community member's letter to the FBI).[26]

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[26] Recognizing that post-9/11 treatment of Arabs and Muslims in the United States caused substantial damage to relationships between those communities and law enforcement, federal and local authorities have made significant recent efforts to rebuild those relationships. *See, e.g.*, Sutherland Testimony at 3–5; *see also* Deborah Ramirez & Stephanie Woldenberg, *Balancing Security and Liberty in a Post-September 11th World: The Search for Common Sense in Domestic Counterterrorism Policy*, 14 Temp. Pol. & Civ. Rts. L. Rev. 495, 504–06 (2005) (describing successes of partnerships between Muslim communities and federal, state and local law enforcement). Similarly, the British government recently has instituted a counterterrorism strategy called "Prevent," a major component of which is to develop greater engagement with

As has occurred elsewhere, moreover, harsh and overbroad detention policies in particular, and a perceived abandonment of the rule of law in general, are likely to aid extremists by facilitating recruitment of the disaffected. *See* Hearing before S. Select Comm. on Intelligence, 111th Cong. 7 (Jan. 22, 2009) (statement of Dennis C. Blair, nominee for Director of National Intelligence) ("[T]he detention center at Guantanamo has become a damaging symbol to the world and . . . it must be closed. It is a rallying cry for terrorist recruitment and harmful to our national security . . . ."). As the former Inspector General of the Homeland Security Department has observed, "Al Qaeda regards American prisons . . . as particularly fertile territory for planting and harvesting the seeds of terrorism." Ervin, *supra*. The recruitment danger has been recognized abroad as well. *See, e.g.*, Sharma, *supra* (during the debates surrounding India's new anti-terror law, one lawmaker warned against making the law too harsh, stating, "[u]nnecessary harassment only provides fertile ground for breeding terrorists").[27]

Britain's Muslim communities. *See* Brendan O'Duffy, *Radical Atmosphere: Explaining Jihadist Radicalization in the UK*, 41 Pol. Sci. & Politics 137, 142 (2008).

[27] The courts of this and other countries, too, recognize that due process and respect for law are important ingredients in the fight against terror and violence. *See People's Union for Civil Liberties v. Union of India*, AIR 2004 SC 456, 467 ("[T]errorism thrives where human rights are violated."); *cf. Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[F]ear breeds repression; . . . repression breeds hate; [and] . . . hate menaces stable government").

Detention practices that depart from the conventional criminal process also threaten the United States' standing in the international community,[28] thus undermining the United States' ability to secure counterterrorism cooperation from other countries. *See* Deborah N. Pearlstein, *National Intelligence and the Rule of Law*, 2 Advance 11, 16 (Fall 2008) ("[W]idely reported U.S. practices of kidnapping and secretly imprisoning and torturing terrorist suspects led the British to withdraw from previously planned covert operations with the CIA because the United States failed to offer adequate assurances against inhumane treatment and rendition."). Legitimacy at the international level is essential, as "terrorism is a transnational phenomenon and . . . demands a transnational response." Cole, *supra*, at 958. The United States needs the cooperation and assistance of other nations' law enforcement and intelligence networks to fight terrorism effectively. *Id.*; *see also* Cannistraro, *supra* (describing the arrest by Spanish

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[28] Or place the United States in unwelcome company: some countries whose legal systems are less protective of individual liberties than ours conveniently cite to the United States' post-September 11 actions as justification for their own practices. Egypt's President Hosni Mubarak has stated that the steps the United States took following September 11 demonstrated that "we were right from the beginning in using all means . . . to combat terrorism." Lawyers Comm. Report, *supra*, at v. Eritrea's Ambassador to the United States justified the two-year incommunicado detention without charge of ten journalists who had written articles critical of that government by analogizing to "America's roundup of material witnesses and suspected aliens" following September 11. *Id.* at 78.

police of Mohammad Galeb Kalaje Zouaydi, who helped fund the September 11 attacks, and 23 other Al Qaeda suspects, and the apprehension by Dutch, French, Italian, and German forces of al Qaeda members; concluding "[i]n all, some 1,600 Qaeda suspects have been arrested in over 30 countries").

In short, it is not the extraordinary power to depart from established due process norms that will foster the cooperation from communities and allies on which effective counter-terrorism measures depend, but rather the faithful observance of those norms and processes.

CONCLUSION

In his Inaugural Address last week, the President said: "As for our common defense, we reject as false the choice between our safety and our ideals." *Amici* urge this Court, too, to reject that false choice. Insofar as the Fourth Circuit Court of Appeals' decision construed the AUMF to authorize the Executive to detain indefinitely a person lawfully residing in this country by labeling him an "enemy combatant," the decision should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,
Petitioner,

v.

COMMANDER DANIEL SPAGONE,
U.S.N., CONSOLIDATED NAVAL BRIG,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation founded in 1958 with over 13,000 subscribed members, including military defense counsel, public defenders, private practitioners and law professors, and an additional 35,000 state, local and international affiliate members. The NACDL seeks to encourage the integrity, independence and expertise of defense lawyers in criminal cases, both civilian and military, to ensure justice and due process for persons accused of crime, to promote the proper and fair administration of criminal justice (including military justice), and to preserve, protect and defend the adversary system, the right to counsel and the U.S. Constitution.[1]

The NACDL first filed a brief in support of Petitioner's constitutional right to civilian criminal due process in June 2003 when opposing his transfer from civilian criminal detention to military custody by order of the President. Since then, the NACDL has opposed the Government's contention that the AUMF authorizes and the Constitution permits the deprivation of the Sixth Amendment rights of U.S. residents on the basis of the Executive's factual determination that they are "enemy combatants." The NACDL will demonstrate here that the Fourth Circuit's failure to hold the Government to its Sixth Amendment obligations was both forgetful of the

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

historical precedent giving rise to those obligations and neglectful of the disastrous consequences of setting them aside.

SUMMARY OF ARGUMENT

It has been our legal tradition for the past three centuries—since the Treason Act of 1696 up until the military detentions of Jose Padilla in 2002 and of Ali al-Marri in 2003—to subject the Government to the risks of a full adversarial criminal proceeding before assessing the guilt of a civilian who stands accused as an internal enemy of the state.

To withdraw the Sixth Amendment's guarantees based on the facts alleged here, in the context of a high security detention at the behest of the chief executive, runs counter to the original purpose of the Sixth Amendment's safeguards and to the Founders' paramount concern in securing them. The Sixth Amendment safeguards were not designed solely, or even primarily, for garden-variety crimes. Rather, the Founders well knew that these safeguards originated in the political trials of the late 17th-century when the Executive's interest in expedient, summary process was most forceful. The direct textual sources of the Sixth Amendment's safeguards in the First Congress's Treason Act, the Continental Congress's treason statutes, as well as the prototype of the Sixth Amendment's principles in the jury trial and treason clauses of Article III, reflect the Founders' understanding that providing criminal procedures precisely when the Executive and general public are most motivated to dispense with them serves as the paramount guarantee against tyranny. The Executive's unwillingness to allow a suspected internal enemy such as Mr. al-Marri to confront the

accusations against him cannot override the rule of Sixth Amendment criminal process now. It was just such unwillingness that gave rise to the safeguards in the first place.

The Fourth Circuit's failure to hold the Government to its Sixth Amendment obligations was both forgetful of this history and short-sighted. We will be doomed to revisit the abuses of our 17th-century legal forebears if we revert to their practices and rationales, forgetting the admonitions of our Founders. Justifications that have not been heard for over three hundred years resound in the judges' opinions below.

But not even expediency can justify the substitution of well-evolved arrest and detention procedures for the Government's purported unreviewable military discretion. The notion that Congress meant to deploy a rarely exercised military detention power devoid of legal protocols against its own constituents in order to better secure their safety is the less credible the more its practical effects are considered. First, the threat of military detention will compel unconstitutional guilty pleas. Second, constitutional standards for civilian arrest and initial detention will devolve into law of war standards immune from review or subject to abstention doctrines. Third, the Government will be able to avoid even curtailed habeas review of its conduct through the Hamdi settlement and Padilla transfer strategies it has already devised. The benefits of a largely unreviewable domestic military detention power are too speculative at best, and its disruptions too certain, to justify so radical a departure from

criminal due process—a bedrock principle of our system of limited government.

Both as a matter of faithfulness to our founding principles and as a matter of pragmatism, the Fourth Circuit's judgment that the AUMF may override the Sixth Amendment must be reversed.

ARGUMENT

I. THE GOVERNMENT CANNOT AVOID THE SIXTH AMENDMENT IN THIS CASE

The Government persuaded a majority of the court below that Congress has authorized the use of military force to capture and detain Mr. al-Marri and others like him without criminal trial and that this purported authorization is constitutional. But it is clear that the Constitution forbids such a reading of the AUMF. The Constitution requires full Sixth Amendment due process in this case, not merely because the Sixth amendment reserves those rights to all U.S. residents, but because Mr. al-Marri is precisely the type of prisoner whom the Sixth Amendment safeguards were originally devised to protect.

A. Sixth Amendment Safeguards Were Originally Devised for High Security Detentions

The Sixth Amendment "includes a compact statement of the rights necessary to a full defense," *Faretta v. California*, 422 U.S. 806, 818 (1975): "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of

Counsel for his defence." U.S. CONST. amend. VI. These four essential procedural safeguards "emerged" from "English and colonial jurisprudence," *Faretta*, 422 U.S. at 818, first appearing in the Treason Act of 1696, 7 & 8 William III (Eng.).[2] But this "charter of defensive liberties was not a general criminal procedural code."[3] Its "reforms were carefully restricted" to high security detainees accused of massive threats to the nation's security.[4] Significantly, although the British Act's procedural safeguards were extended to ordinary felons in the 1730s,[5] and although colonial treason statutes extended, by the 1770s, to other capital as well as

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[2] The Treason Act of 1696 provides seven safeguards: (i) that "persons accused as Offenders . . . shall have a true Copy of the whole Indictment . . . delivered to them . . . whereby to enable them . . . to plead and make their Defence"; (ii) that "every such Person so accused and indicted, arraigned or tried for any such Treason . . . shall be received and admitted to make his and their full Defence, by Counsel learned in the law, [(iii)] and to make any Proof that he or they can produce by lawful Witness or Witnesses, who shall then be upon Oath"; (iv) that "the Court before whom such Person or Persons shall be tried . . . assign to such Person and Persons such and so many Counsel . . . as the Person or Persons shall desire, [(v)] to whom such Counsel shall have free Access at all seasonable Hours; any Law or Usage to the contrary notwithstanding"; that (vi) "all Persons so accused and indicted for any such Treason as aforesaid . . . shall have copies of the panel of the Jurors who are to try them"; and (vii) that the accused "shall have the like Process of the Court where they shall be tried, to compel their Witnesses to appear for them at any such Trial or Trials, as is usually granted to compel Witnesses to appear against them." 7 & 8 Will. 3, c. 3 (1696).

[3] JOHN LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 97 (2005).

[4] *Id.* at 102.

[5] *Id.*

lesser crimes,[6] or even to all crimes in some colonies,[7] the Founders nonetheless reverted to the terms of the 1696 Act and gave priority in the text of Article III to procedural safeguards solely for prisoners held on national security grounds. *See* U.S. CONST. art. III, § 3, cl. 1.[8] The 1696 Act's seven safeguards were incorporated almost verbatim by the First Congress, which provided to treason and other capital offenders the same protections (but required an additional day for treason defendants to review the indictment and jury and witness lists).[9] In addition, the right to

[6] The Continental Congress recommended to the colonies that they pass treason legislation, drawing on the requirements of the 1696 Act. *See* HURST, THE LAW OF TREASON IN THE UNITED STATES 84 (1971); *id.* at 108-09 nn. 8-11, 114 n. 28 (citing the statutes of New Haven Colony, Connecticut, Massachusetts Bay, New Hampshire, Delaware, North Carolina, Pennsylvania, Rhode Island, South Carolina, and Virginia).

[7] *See, e.g.*, Virginia Declaration of Rights, VIII (June 12, 1776).

[8] The Committee of Detail drafted Art. III, § 3, cl. 1, the Treason Clause, in August 1787. The Treason Clause was viewed as "summing up the law pertaining to subversive activities against the Federal Government." HURST, *supra*, at 158. The broad admonitions implicit in the clause and inferable from its history are now enforced by the Fifth and Sixth Amendments and therefore still observed when charges are brought under the array of statutes now devised for prosecuting crimes of terrorism. Where the Founders saw the necessity of defining the elements of the crime and its procedural safeguards together, the Sixth Amendment now ensures that all charges will be tried with appropriate safeguards.

[9] The seven safeguards of the 1696 Act incorporated by the First Congress include: (i) a copy of the indictment; (ii) a list of the jurors (and witnesses, Congress adds); (iii) presentation of a full defense by counsel learned in the law; (iv) assignment of counsel by the judge—not to exceed two; (v) counsel's free access to the defendant at all seasonable hours; (vi) presentation of any defense or any proof defendant can produce; and (vii) compelling

remain silent was guaranteed first to national security defendants by the First Congress, 1 Stat. 112, § 30 (1790), and in the right against coerced self-incrimination in the Treason Clause's requirement of "confession in open court," before it was incorporated in the Fifth Amendment in 1791. When James Madison set out to draft the Sixth Amendment, *see Faretta*, 422 U.S. at 818, he was extending to every common criminal the protections previously associated most closely with prisoners who presented extraordinary threats to the security of the nation.

Thus, the idea that the rights set forth in the Sixth Amendment need only be provided to familiar criminals such as "car thieves and drug dealers,"[10] yet may be withheld from a high-security terrorism suspect detained on the President's orders, gets our history backwards. Mr. al-Marri is entitled to criminal due process not because the Sixth Amendment does not permit detention without trial in any instance,[11] but, rather because the Sixth

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(continued...)

of witnesses in like process to that granted to the prosecution. *See* Act of April 30, 1790, 1 Stat. 112, § 29.

[10] "[O]ur critics insist that these combatants should receive the benefit of the rules and procedures of our criminal justice system, those tried and true methods that we use to deal with criminals such as car thieves and drug dealers." Remarks by Alberto R. Gonzales, American Bar Assoc. Standing Committee on Law and National Security, *available at* http://www.fas.org/irp/news/2004/02/gonzales.pdf.

[11] *Cf. Al-Marri v. Pucciarelli*, 534 F.3d 213, 305 (4th Cir. 2008) (Wilkinson, J., concurring and dissenting in part) (citing diverse contexts in which preventative detention as an alternative to criminal prosecution is authorized).

Amendment cannot be read to permit exception in this instance.

B. The Reasoning In *Crawford* Applies *A Fortiori* Here

The form that the Government's evidence against Mr. al-Marri takes—a triple hearsay compilation by one government official of *ex parte* examinations of unnamed sources by other unnamed government officials[12]—is exactly the type of evidence that the Sixth Amendment's confrontation clause was originally designed to test, as *Crawford* makes clear.[13] But there is a more trenchant reason why the Sixth Amendment safeguards must apply here. The Sixth Amendment's direct textual sources, namely the First Congress's Treason Act of 1789, the colonial treason statutes, and the Treason Act of 1696, 7 & 8 Will. 3, together demonstrate that the Sixth Amendment's safeguards were originally enacted to test the substance of the kind of accusations that the Government makes here, as well.

Judge Wilkinson asserts below that "[n]othing in our constitution requires the elected branches to treat terrorism invariably as a criminal offense," and that "the judiciary has no right in the name of constitutional law to compel criminal prosecution of

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[12] The Government filed a Declaration of Jeffrey N. Rapp, Sept. 9, 2004, and a classified, secret declaration of Mr. Rapp as evidence. Pet. App. 449a.

[13] *Crawford v. Washington*, 541 U.S. 36, 50 (2004). "[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."

terrorist suspects in all instances."[14] But the reasoning in *Crawford* is to the contrary. In *Crawford*, this Court applied the forgotten historical rationale for the right of confrontation to the question of whether it could be withheld, clarifying that while the right might lawfully be unavailable for some hearsay exceptions, it could not be withdrawn in the context of an *ex parte* examination by government officials. That is because the problem of *ex parte* examinations had given rise to the confrontation safeguard; such testimony could not now work an exception to the safeguard. The rule in Crawford applies *a fortiori* here where the entire Sixth Amendment has been set aside and in the very context that its provisions were specifically devised to address: detention at the behest of the chief executive on accusations of dire threat to the nation.

C. Domestic Enemy Combatant Detentions Resemble 17th-Century State Trials and Rely on Their Rationales

"In the 16th and 17th centuries, the accused felon or traitor stood alone, with neither counsel nor the benefit of other rights—to notice, confrontation, and compulsory process—that we now associate with a genuinely fair adversary proceeding." *See Faretta*, 422 U.S. at 823. Procedural safeguards were not unknown prior to 1696, but were deliberately withheld from felony and treason defendants in order to secure the prosecution's success.[15] The prisoner

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[14] *Al-Marri*, 534 F.3d at 304.

[15] "While a right to counsel developed early in civil cases and in cases of misdemeanor, a prohibition against the assistance of counsel continued for centuries in prosecutions for felony or treason." *Faretta*, *id.* (citing 1 J. STEPHEN, A HISTORY OF THE

was "kept in close confinement till the day of his trial. He had no means of knowing what evidence had been given against him. He was not allowed as a matter of right, but only as an occasional, exceptional favour, to have either counsel or solicitors to advise him . . . ."[16] As is true today in Mr. al-Marri's case, the pre-1696 prisoner was not permitted "to see his witnesses and put their evidence in order." *Id.* The prisoner's witnesses were not permitted to be sworn, *id.* at 398, and prisoners had no copy of the indictment against them or of the panel of jurors, *id.* at 398-99. All this amounted to one overriding concern: keeping the evidence against the detainee secret. "The real grievance was keeping the prisoner in the dark as to the evidence against him." *Id.* at 399. But more tellingly, the reasons for keeping the prisoner in these conditions and limiting his ability to mount a defense were the same ones now offered by the Government and the court below for providing U.S. residents with a curtailed "post-detention status hearing" rather than a jury trial: to prevent communication with co-conspirators; to prevent willing or inadvertent relaying of messages through counsel; the urgency of obtaining a conviction, and of keeping the prisoner from escaping. In sum, overriding concern with risk and inconvenience outweighed regard for individual liberty. The same weighty concerns come to bear on Mr. al-Marri in the Fourth Circuit's judgment. As Judge Wilkinson

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(continued...)

CRIMINAL LAW OF ENGLAND 341 n.18 (1883)); *see also* LANGBEIN, *supra*, at 36.

[16] 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 398 (Burt Franklin ed. 1883).

explains, "serious threat to community safety" and "significant barriers to criminal prosecution" are reason enough to deny Mr. al-Marri procedural safeguards. Pet. App. 209a. In the Fourth Circuit's views, as in the 17th century, "[t]he sentiment continually displays itself that the prisoner is half, or more than half, proved to be an enemy of the King and that, in the struggle between the King and the suspected man, all advantages are to be secured to the King whose safety is far more important to the public than the life of such a questionable person as the prisoner."[17]

The crown's state trials were not just about plans to murder the monarch but about general security threats to the nation, "a miserable slaughter among the faithful Subjects . . . throughout this whole Kingdom."[18] "Catholics were accused of preparing to massacre protestants and introduce an army from abroad. . . . Hysterical fears of an impending massacre of all protestants gripped London, and anti-papist excitement quickly enveloped all sections of the population."[19] A short list of the plots and rebellions prosecuted in the period demonstrate that the times were no less fraught with terror than our own. Within ten years, the Popish Plot (1678-80) the Meal Tub Plot (1680), the Rye House Plot (1685), the Bloody Assizes (1685) and the Trial of the Seven Bishops (1688), all driven by anti-papist or anti-Whig

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[17] STEPHEN, *supra*, at 397.

[18] The Arraignment, Tryal and Condemnation of Ambrose Rookwood . . . upon the New Act of Parliament for Regulating Tryals in Cases of Treason (1696).

[19] J. R. JONES, COUNTRY & COURT: ENGLAND, 1658-1714, at 201-02 (1978).

political factionalism, led to crops of martyrs. Executions on trumped up charges finally drew attention to the unfairness of the terror defendant's position, raising sufficient alarms to cause Parliament to enact the reforms, LANGBEIN, *supra* at 78—after debating the 1696 Act for eight years.[20]

In sum, the concerns for safety and expediency articulated by the Government here are the very same that gave rise to centuries of abuses, which in turn led to the early formulations of the rights now enshrined in the Sixth Amendment. The Court should therefore firmly reject the Government's misplaced efforts to revive these concerns now as a justification for depriving U.S. residents of their rights.

II. THE GOVERNMENT'S PURPORTED AUTHORITY TO AVOID THE SIXTH AMENDMENT DISRUPTS THE CRIMINAL JUSTICE SYSTEM AND THE COURTS

Apart from its constitutional infirmities, the notion that Congress meant to authorize the displacement of criminal due process with an alternative military detention scheme for persons seized within the United States is barely credible as a practical matter. Yet its implications must be examined. Al-Marri is the sole remaining domestically detained "enemy combatant," and (with Hamdi and Padilla, both of whom have been released from military custody) one of only three U.S. citizens or residents to have been detained pursuant to the AUMF. But the uniqueness of Mr. al-Marri's predicament provides no assurance that the Government intends to use its domestic

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[20] *See* LANGBEIN, *supra*, at 86.

detention authority sparingly in future. "Enemy combatant" detentions may at some future point become more prevalent, disrupting and distorting the administration of criminal justice.

A. Discretionary Military Detention Will Force Unconstitutional Plea Bargains

The threat of military detention will corrode the adversarial system by coercing plea bargains. Under the Fourth Circuit's rule, the Executive will have two detention tracks to choose from—criminal and military—and will be free to choose the lesser burdens of the military route at its discretion. As former Attorney General Gonzales explained, "[t]here is no rigid process for making such determinations—and certainly no particular mechanism required by law."[21] The result is that the threat of prolonged imprisonment in a 9 x 6 foot cell, incommunicado—a condition of confinement that this Court has compared to "the rack, the thumbscrew, [and] the wheel," *Chambers v. Florida*, 309 U.S. 227, 237 (1940)—will hang over every terrorism prosecution, even when the designation is not made.

The purpose of the adversarial criminal process is to uncover the truth of the defendant's guilt or innocence *prior to* prolonged detention, so as to ensure that only the guilty are punished.[22] Plea

[21] Gonzales, *supra*, at 12.

[22] *Bell v. Wolfish*, 441 U.S. 520, 531 (1979) (conditions of pretrial detention violate due process when they amount to punishment); *see also Wilkins v. May*, 872 F.2d 190, 194 (7th Cir. 1989) ("if ever there were a strong case for 'substantive due process,' it would be a case in which a person who had been arrested but not charged or convicted was brutalized while in custody"); *cf.* U.S. CONST. amend. VI ("the accused shall enjoy the right to a speedy . . . trial").

bargains likewise aim for accuracy and fairness in that an "intermediate judgment" can ensure the "relative equality of results as between defendants similarly situated" and "relative congruence between the formal verdict and . . . conduct."[23] For this reason, "the full-blown negotiated plea is not merely an appeal for mercy; it is an adversary process."[24] As recently noted, a guilty plea is "highly tactical, since it usually requires balancing the prosecutor's plea bargain against the prospect of better and worse outcomes at trial."[25] This balancing and negotiation cannot occur when the Government has the leverage to effectively force a plea agreement by threatening to transfer a defendant to an isolated brig for prolonged interrogation. Likewise, for the defendant, the very possibility of transfer to indefinite military detention in severely punishing conditions, subject only to a *Hamdi* status hearing, creates a threat so disproportionate to the risks of criminal sentencing that it all but forces the defendant to plead guilty even where there is a low risk of criminal conviction, in violation of due process.[26] Most crucially, because the plea bargain is at the Executive's discretion, and there are no rules governing the unilateral decision

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[23] ARNOLD ENKER, PERSPECTIVES ON PLEA BARGAINING, IN PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS, 113-14 (1967).

[24] DONALD NEWMAN, CONVICTION 216 (1966).

[25] *Gonzalez v. United States*, 128 S. Ct. 1765, 1774 (2008) (Scalia, J. concurring).

[26] Carl Takei, "Terrorizing Justice: An Argument that Plea Bargains Struck Under the Threat of 'Enemy Combatant' Detention Violate the Right to Due Process," 47 B.C. L. REV. 581 (2006).

whether to pursue trial, plea bargain, or transfer,[27] the Government is most likely to use its military option when it has the least viable evidence, a tactic that may impose torturous conditions on suspects with the strongest defense against their charges, while preserving the right of trial by jury for the most clearly guilty. In this way, even the threat of an enemy combatant designation perverts the truth-seeking objectives of the adversarial criminal trial.

There is more than theoretical support for the prediction that the Fourth Circuit's rule, providing the Government with the option of "enemy combatant" designation, will force guilty pleas in violation of due process. The Lackawanna Six[28] anticipated that they could be transferred to military custody before they were all sentenced under plea agreements in 2003.[29] Indeed, both the Vice President and Secretary Rumsfeld reportedly had pushed for military detention of the six,[30] and U.S.

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[27] "[N]umerous options are considered by the various relevant agencies (the Department of Defense, CIA and DOJ), including the potential for a criminal prosecution, detention as a material witness, and detention as an enemy combatant." Gonzales, *id.*, *supra* n.10. "Options often are narrowed by the type of information available, the individual's threat potential and value as a possible intelligence source." *Id.* at 13.

[28] *See* Dina Temple-Raston, "Enemy Within? Not Quite," WASH. POST, Sep. 9, 2007, at B1 (on the six Yemeni-American men from Lackawanna, New York convicted of training at an al-Qaeda camp).

[29] Scot J. Paltrow, "U.S. Exerts Unusual Pressure on Group of Terror Suspects," WALL ST. J., Apr. 1, 2003; Eric Lichtblau, "Wide Impact From Combatant Decision is Seen," N.Y. TIMES, June 25, 2003.

[30] Michael Isikoff & Daniel Klaidman, "The Road to the Brig: After 9/11, Justice and Defense Fought over How to Deal with

Attorney Michael Battle "conceded that his office had discussed that possibility with the Defense Department."[31] As a result, "'[w]e had to worry about the defendants being whisked out of the courtroom and declared enemy combatants if the case started going well for us,' says Patrick J. Brown, attorney for one of the six. 'So we just ran up the white flag and folded.'"[32] "Defense attorneys describe[d] working blind, never knowing how far Washington would push. . . . In the end the government took the enemy combatant designation off the table and the defendants pleaded guilty." *Id.* And, as a condition of the plea, the Government agreed to "forego any right it ha[d] to detain the defendant as an enemy combatant."[33]

Al-Marri's case demonstrates the catastrophic results of pleading innocence under threat of military detention. The Government first detained al-Marri as a material witness on December 12, 2001, then filed successive charges of credit card fraud, lying to

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(continued...)

Suspected Terrorists," NEWSWEEK, Apr. 26, 2004, at 26, *available at* http://www.newsweek.com/id/53781/output/print.

[31] Phil Hirschkorn, "Fourth Guilty Plea in Buffalo Terror Case," CNN.com, Apr. 9, 2003, *available at* http://www.cnn.com/2003/LAW/04/08/terror.cell/.

[32] Michael Powell, "No Choice But Guilty: Lackawanna Case Highlights Legal Tilt," WASH. POST, Jul. 29, 2003, at A1.

[33] Press Release, U.S. Dep't of Justice, United States Attorney's Office Successfully Concludes Terrorism Case with Sixth Conviction of Al Qaeda Supporter (May 19, 2003), at Plea Agreement, 28; on file with Yin, "Coercion and Terrorism Prosecutions," *infra*, n.35 (quoting plea agreement and noting the terms were similar in all six).

a federal agent, bank fraud and identity theft. Br. for Pet'r at 2-4. When al-Marri pled not guilty and mounted an aggressive defense, as was his constitutional right, *id.* at 3, the Government made the decision to seek his transfer to military custody. *Id.* at 4-6. As former Attorney General Ashcroft describes the decision, Al-Marri "rejected numerous offers to improve his lot by cooperating" and "made himself a tough case."[34] The Attorney General implies that al-Marri could have spared himself designation as an enemy combatant and transfer to a U.S. naval brig where he remains to this day without contact with the outside world. But if Mr. al-Marri had anticipated the Government's tactics, as the Lackawanna Six were able to, he surely would not have chosen to defend his case. Cooperating with the prosecutor cannot be termed a choice or bargain when refusal leads to total loss—in this case, the purported loss of all the rights and protections of civilian status.[35]

B. Domestic Military Arrest and Detention Will Displace Civilian Procedures

The Government's purported authorization to use military force against U.S. civilians dispenses with the evolved rules and norms of civilian arrest and detention and substitutes a procedural blank slate. Just as there are no laws controlling the President's decision to detain, *see* Gonzales, *supra* n.10, there are

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[34] JOHN ASHCROFT, NEVER AGAIN: SECURING AMERICA AND RESTORING JUSTICE 169 (2006).

[35] *See* Tung Yin, "Coercion and Terrorism Prosecutions in the Shadow of Military Detention," 2006 B.Y.U. L. REV. 1255 (2006) (comparing implied threat of military transfer to blackmail and applying vindictive prosecution doctrine).

no guidelines governing the conduct of the capture and initial detention. And even if there were military guidelines controlling these questions, it is not likely that they would be reviewable by civilian courts. The Government assured the en banc judges at oral argument below that all claims regarding capture and detention could be raised in the *Hamdi* proceeding.[36] But the *Hamdi* plurality holds that "the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war,' *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004), and therefore not subject to civilian claims. The plurality envisions that "the errant tourist, embedded journalist, [and] local aid worker" found on the battlefield would have "a chance to prove military error" at a *Hamdi* hearing, *id.* at 534, but certainly could not challenge how violently they were detained, or for how little probable cause, or with how much collateral damage. These are military decisions. Yet once the "enemy combatant" becomes a U.S. resident, and his home or workplace becomes the constructive "battlefield," the lack of check on the mode of capture or conditions of initial confinement presents a host of practical and

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[36] *See al-Marri v. Wright*, No. 06-7427, (4th Cir. Oct. 31, 2007) unofficial transcript of oral argument at 100-102, *available at* http://brennan.3cdn.net/e75ca720b7416fd646_bym6vjh5i.pdf ("Unofficial Transcript of Oral Argument"). Asked how U.S. residents would be protected against baseless or discriminatory detentions, or how they might bring claims for abusive conditions of arrest and confinement, the Government's puzzling response was that the same curtailed *Hamdi* hearing that denies all Sixth Amendment rights and institutes a presumption in the Government's favor would provide a full opportunity to raise any other applicable constitutional or statutory claims. *See id.*

legal problems that may degrade the civilian constitutional standards:

1. Notice: Under the AUMF's purported military authorization, no rules require the military to take responsibility for the disappearance of a U.S. resident or provide notice as to why the prisoner has been detained, where he or she is being held, or who is the custodian. No rules specify how long the Department of Defense ("DOD") can conceal that information or whether the public or the prisoner's family has the right to be informed. The Government provided notice to al-Marri's attorneys ad hoc, as a matter of discretion, at the Judge's request. *See al-Marri v. Bush*, No. 03-1220, Opp. to Mot. to Dismiss, Ex. B (C.D. Ill. July 23, 2003), 14-15. But it is unclear how the military intends to initiate the detention of U.S. residents when they are not already under civilian criminal jurisdiction. Presumably, the laws of war and judicial abstention doctrines that apply to foreign policy decisions would apply to the conduct of military captures in the United States. *See, e.g.*, *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006) (dismissing as nonjusticiable claims arising from the Government's forcible removal of plaintiffs from their homes); *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005) (dismissing claims of sons of Chilean general kidnapped at Secretary of State's urging); *Christopher v. Harbury*, 536 U.S. 403 (2002) (reversing judgment that widow of kidnapped dissident had claim for relief from CIA officials who falsely denied knowledge of his location).

2. Denial of Counsel: The *Hamdi* plurality held that persons detained as "enemy combatants" "unquestionably ha[ve] the right to access to counsel

in connection with their [status] proceedings." *See* 542 U.S. at 539 (plurality op.). In addition, the plurality agreed that "indefinite detention for the purpose of interrogation is not authorized [by the AUMF]." *Id.* at 521. On the same day, three other Justices (along with one member of the *Hamdi* plurality) agreed that prolonged interrogation in isolation—the very purpose that the Government had repeatedly offered as justification for the detentions—was unlawful. *See Rumsfeld v. Padilla*, 542 U.S. 426, 465 (2004) (Stevens, J. dissenting). The Government appeared to comply, ceasing the interrogation of al-Marri, which, at that point, had continued for two years.

Yet before the court below, the Government reasserted its putative authority to seize any U.S. resident and hold him for the purpose of interrogation, without access to counsel or notice to family or the public, for "some period" of time.[37] In oral argument en banc, Mr. Garre could not clarify at what point he believed a U.S. resident's right to counsel attaches or after what period of time interrogation in isolation becomes unlawful. *Id.* at 104.

Thus, despite admonitions from members of this Court that the Government's "purpose of interrogation is not authorized" by the AUMF, and that "incommunicado detention for months on end" is an "unlawful procedure[]," the Government continues to justify its alleged detention authority on the basis that it allows for incommunicado detention and a period during which the right to counsel is suspended. And rather than set any standards for

[37] *See* Unofficial Transcript of Oral Argument at 103.

the interrogation period, the Government proposes that "enemy combatant cases ought to be taken and viewed very carefully on a case-by-case basis, with the particular facts of each case." *Id.* at 97.

3. Uncertain remedy for constitutional or other violations in course of capture or initial detention: If a U.S. resident "enemy combatant" has no Sixth Amendment rights, it is not clear what other constitutional rights could be vindicated by a *Hamdi* status hearing. Although the conditions of criminal detention are frequently subject to habeas review, it is not clear whether a U.S. resident detained militarily by the President and deprived of Sixth Amendment rights would nevertheless be protected by the Eighth Amendment, or whether the Government intends to hold itself to army regulations or other law of war standards. Would the DOD or its individual officers be liable for Fourth or Fifth Amendment privacy or property violations that occur during the capture or period of detention? Or would the Government be entitled to military exceptions to its waiver of sovereign immunity and other doctrines exempting military conduct from review? *See, e.g.*, 28 U.S.C. § 2680(j) (excepting from the Federal Tort Claims Act "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war"). Alternatively, would law of war standards apply to the conditions of military detention? Would military standards apply to the conditions of detention, even if the habeas petitioner eventually prevails? The Government responded with assurances when asked at en banc oral argument whether "there would be no

impediment to a [§] 1983 suit,"[38] but there are significant jurisdictional impediments whenever a civilian seeks to remedy injuries arising from military conduct. The Government's contention that a presumptive "enemy combatant" forced to rebut hearsay testimony without the safeguards of the Sixth Amendment could expect to prevail at the same hearing or later on a *Bivens*, FTCA or common law claim is simply not credible.

4. The Rights of Bystanders: Finally, it is unclear whether injuries to bystanders or their property caused by a military capture would be subject to civil claims or whether they would be unreviewable under various statutes and doctrines immunizing military conduct.

In sum, under the Fourth Circuit's rule, the military has free reign to conduct the capture and temporary detention of U.S. residents as it sees fit. And if a capture or detention violates the Constitution or the laws of war, the federal courts' opportunity to review the military's conduct will be severely limited. While courts may struggle to create new rules to address these problems, this would be to reinvent the Bill of Rights, provision by provision. The number of legal issues that are left indeterminate in this scheme highlights the superiority of our well-developed civilian arrest and detention procedures.

C. Temporary Military Detentions Will Evade Review

Hamdi's provision for habeas jurisdiction and a post-detention status determination provides the only

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[38] Unofficial Transcript of Oral Argument at 112-13.

third branch check on the Government's purported military authority under the AUMF to detain U.S. residents. But, at best, the *Hamdi* hearing prevents only *indefinite* military detention without some check. The Government may use its *Hamdi* settlement and *Padilla* transfer strategies to avoid a *Hamdi* hearing.

The DOD has little incentive to reach a fact-finding proceeding, even a constitutionally curtailed one, if it can instead settle with the U.S. resident and obtain waiver of all claims. In the same way, the DOD has little incentive to hold a U.S. resident indefinitely if it can hold him only temporarily and then transfer him to civilian criminal custody when the burdens of review are imminent. We have seen both these tactics used in the only two other enemy combatant cases besides al-Marri's, and the Government may continue this pattern in future, despite the rule in *Hamdi*.

1. Hamdi Settlement

After holding Yaser Hamdi for over three years in solitary confinement on the basis of nine paragraphs of unsupported hearsay, the Declaration of Michael H. Mobbs, *Hamdi v. Rumsfeld,* No. 2:02CV439 (E.D. Va., July 24, 2002), the Government negotiated an agreement rather than submit to even curtailed review of the factual basis for Hamdi's purported combatant status.[39] The Agreement releases Hamdi from custody, recording his assertion that he "never affiliated with or joined a Taliban military unit, never was an enemy combatant, that is never was part of or supported forces hostile to the United

[39] Motion to Stay Proceedings, *Hamdi v. Rumsfeld*, No.2:02CV439 (E.D. Va. Sep. 24, 2004), Agreement.

States and, never engaged in armed conflict against the United States." *Id.* In addition, Hamdi "also maintains he was never a member of nor affiliated with al Qaeda." *Id.* But in return for his release and transport to Saudi Arabia, Hamdi agrees, *inter alia*, to forfeit his U.S. nationality, *id.* ¶ 8, and all claims against the United States or its officers for any violation of law prior to the agreement date, *id.* ¶ 13.

The *Hamdi* settlement is the presumptive enemy combatant's equivalent of a plea bargain. As in the civilian criminal context, there is no real bargaining power or ability to refuse when the alternative is the immeasurable risk of unending confinement in unremediable conditions. A U.S. resident with potential claims arising from her military detention would have to abandon them given the opportunity for release. The Government's incentive, particularly with U.S. residents mistakenly detained, will be to settle and obtain release of any claims so as to avoid creating limiting precedents. But the detained U.S. resident will not have the competing incentive to risk unlimited detention in order to litigate rights already violated.

With the threat of indefinite military detention as a bargaining tool, the Government will invariably obtain favorable settlement terms such as the forfeiture of citizenship and the release of claims relating to the detention. The Government may thus wield an extensive detention authority on the sole basis of the President's designation with no practical judicial check.

2. Padilla Transfer

Alternatively, under the Fourth Circuit's rule, the Government may detain a U.S. resident militarily,

then charge and transfer him to civilian criminal custody prior to his *Hamdi* hearing, thereby avoiding all factual challenge to his temporary "enemy combatant" status. In Padilla's case, the Government was able to avoid both a remand to District Court for a *Hamdi* hearing and imminent review by this Court by filing an indictment for conspiracy after holding Padilla for over three years.[40] During those three years, the Government had filed affidavits and held press conferences[41] "steadfastly maintaining," as Judge Luttig noted, "that it was imperative in the interests of national security" that Padilla be detained without charges.[42] Yet these *ex parte* declarations and public announcements were set aside without ever reaching the limited review of a *Hamdi* hearing, much less cross-examination. Their dire warnings presented no obstacle to Padilla's release from military custody when unfavorable review loomed. The Fourth Circuit panel was left with "impressions" that national security interests had "yield[ed] to expediency." *Id.*

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[40] Superseding Indictment of Nov. 17, 2005, *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

[41] Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, at 3-4 (Aug. 27, 2002); Declaration of Jeffrey N. Rapp, Director, Joint Intelligence Task Force for Combatting Terrorism (Aug. 27, 2004); Declaration of Vice Admiral Lowell E. Jacoby (USN), Director of the Defense Intelligence Agency (Jan. 9, 2003); *see, e.g.*, U.S. Dep. Att'y Gen. James Comey, Justice Department News Conference Concerning Jose Padilla (June 1, 2004) (transcript available at 2004 WL 1195419).

[42] Order, *Padilla v. Hanft*, No. 05-6396 (4th Cir. Dec. 21, 2005), 12.

Thus, as long as the detentions remain temporary, terminated by either settlement or transfer, they can go completely unreviewed and can serve unlawful ends. And because the Government can avoid review through two "catch and release" strategies, the unlawful purpose and conditions that the Government has already pursued—prolonged interrogation in isolation and cruel and degrading treatment—are likely to be repeated.

Moreover, because manipulation of the detention period at the Executive's sole discretion may prevent the federal courts from ever setting constitutional standards for the initial capture or detention of U.S. residents, many other issues that are well-regulated in the criminal law, for reasons of safety as well as fairness, will be left undetermined.

D. Constructive "combatants" and "battlefields" are without clear limits

The Fourth Circuit accepted the Government's expansive construction of the term "enemy combatant" to reach Mr. al-Marri, who was arrested unarmed in his home and detained pursuant to civilian criminal proceedings. But what is the limit on who or what may be construed as a "combatant" acting on a "battlefield"? Al-Marri is a civilian according to all standard dictionary definitions, as well as established law of war understandings that mark the status distinctions articulated in *Quirin* as well as *Milligan*. But according to terms that the Government introduced in 2002, Mr. al-Marri is a constructive combatant, just as Mr. Hamdi and Mr. Padilla were both, for the duration of the litigation of their military detentions, constructive combatants, although the Government never produced evidence

that either Hamdi or Padilla was ever present in any zone of combat. Indeed, the Government has consistently manipulated traditional civilian and military distinctions, refusing to acknowledge that it cannot shift legal paradigms by shifting terminology.

If the Fourth Circuit's reasoning is correct, then there is no limit to the political branches' power to redefine other types of civilians as "enemy combatants," expanding constructive military status to reach new exigencies and conveniences. The justifications offered for reading the AUMF to authorize the military detention of terrorism suspects set no limit on Congress's authority to further militarize jurisdiction over other crimes. The proposed exclusion of a class of suspects from the criminal justice system, if constitutional at all, is without clear limit.

For example, Judge Wilkinson's justifications for carving out an exception to the general rule of Sixth Amendment process—"threat[s] to community safety" and "barriers to criminal prosecution"—could be raised about any number of other types of criminal prosecutions.[43] There is no reason why, under the Fourth Circuit's rule, Congress could not also authorize military detention of domestic terrorists, including individuals acting without an organization, so that anyone, acting alone or as part of a cell, targeting either the government or civilians, could become the subject of an Authorization for the Use of Military Force. Where will the requirement for civilian Sixth Amendment due process be redrawn?

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[43] *Al-Marri*, 534 F.3d at 309 (Wilkinson, J., concurring and dissenting in part).

Constructive combatant status and the constructive battlefield may be expanded *ad absurdum*. As counsel for the accused argued in *Quirin*, "'if you take the theory that everything that was done that might aid the enemy makes it a theater of operations, you reduce the thing to an absurdity.'" PIERCE O'DONNELL, IN TIME OF WAR 226 (2005).[44] Once "the battlefield" becomes a metaphor for a multi-agency review process and the evidence is not "buried in the rubble of war," *Hamdi*, 542 U.S. at 532 (plurality op.), but rather in the discoverable documents of civilian agency officials, then there is no longer a practical reason to maintain the conceit of "enemy combatant" status or the accompanying presumption in favor of the Government's *ex parte* testimony—nor any reason to curtail Sixth Amendment criminal process with a *Hamdi* style review. Rather than allow an exceptional time of war decision, *Quirin*, to authorize a system of routinized, administrative domestic military detentions, the Court should take the opportunity that a sustained crisis provides to retrench our Sixth Amendment principles.

CONCLUSION

The judgment below should be reversed.

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[44] In *Quirin*, the United States focused on the fact that the saboteurs stashed their uniforms, a war crime, in order justify the Government's assertion of military criminal jurisdiction. "Milligan never wore the uniform of the armed forces at war with the United States. Petitioners did. Milligan was a resident of Indiana. He did not . . . enter into a theater of operations. The Petitioners did." When asked if "[t]he mere absence of uniforms makes a difference," the Government's attorney replied, "[a]ll the difference in the world." 317 U.S. 1, 222 (1940).

Respectfully submitted,

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IN THE

Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,
Petitioner,

v.

COMMANDER DANIEL SPAGONE, U.S.N.,
CONSOLIDATED NAVAL BRIG,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RETIRED MILITARY OFFICERS AND THE NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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BRIEF OF RETIRED MILITARY OFFICERS AND THE NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICI CURIAE* [1]

Amici are retired military officers who have spent their careers commanding troops at home and over-

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of the *amici curiae* to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

seas and a nonprofit corporation organized to advance the fair administration of military justice. *Amici* have extensive experience with military jurisdiction and the laws governing military activity. Based on this experience, *amici* are uniquely positioned to address the harmful impact the Fourth Circuit's decision will have on the military. This Court has recognized the value of the military's perspective on questions relating to the military's ability to fulfill its mission to provide national security. *See Grutter v. Bollinger*, 539 U.S. 306, 331 (2003). *Amici's* interest in this case arises from their commitment to preserve the character and strength of the military and protect the relationship between military personnel and civilians.

Brigadier General David M. Brahms served in the Marine Corps from 1963 through 1988, with a tour of duty in Vietnam. During the 1970s, he served as the principal legal advisor for POW matters at Headquarters Marine Corps, and, in that capacity, he was directly involved in issues relating to the return of American POWs from Vietnam. General Brahms was the senior legal advisor for the Marine Corps from 1985 through 1988 when he retired. He is currently in private practice in California and was formerly a member of the Board of Directors of the Judge Advocates Association.

Rear Admiral Donald J. Guter was a line officer in the United States Navy from 1970 through 1974. After law school, he served in the Navy from 1977 until he retired in 2002. From June 2000 through June 2002, Admiral Guter was the Navy's Judge Advocate General. Admiral Guter was inside the Pentagon when it was attacked on September 11, 2001. Admiral Guter is now Professor of Law at

Duquesne University School of Law in Pittsburgh, Pennsylvania.

Rear Admiral John D. Hutson was commissioned in the United States Navy in 1969. After law school, he served in the Navy from 1972 until he retired in 2000. From 1994 until 1996, Admiral Hutson served as the Commanding Officer, Naval Legal Service Office, Europe and Southwest Asia. Admiral Hutson served as the Navy's Judge Advocate General from 1997 until 2000. Admiral Hutson is now Dean and President of Franklin Pierce Law Center in Concord, New Hampshire.

Major General Antonio M. Taguba served in the United States Army from 1972 through 2007. He commanded infantry divisions in the United States, Korea and Germany. General Taguba served as Chief of Staff of the United States Army Reserve Command; Deputy Commanding General (South), First U.S. Army; and Deputy Commanding General for Support, Third United States Army, based in Kuwait. General Taguba led the initial investigation of the United States military prison system in Iraq.

The National Institute of Military Justice ("NIMJ") is a District of Columbia nonprofit corporation organized in 1991. Its overall purpose is to advance the fair administration of military justice in the Armed Forces of the United States. NIMJ also participates actively in the military justice process, through such means as the filing of amicus briefs, commenting on proposed rule changes, as an alternate official nongovernmental organization observer to the military commissions at Guantanamo Bay, Cuba, its website (www.nimj.org), and its publications program. NIMJ's advisory board includes law professors, private practitioners, and

other experts in the field, none of whom are on active duty, but nearly all of whom have served as military lawyers, several as flag and general officers.

Amici file this brief to point out the importance of questions raised by this case for the relationship between military and civilian authorities in domestic law enforcement activities, and to direct the Court's attention to (1) the statutory framework for the military's domestic activity including the Posse Comitatus Act of 1878, 18 U.S.C. § 1385, and (2) the negative consequences of a deviation from this framework for the United States military and its relationship with civilians. Based on their experience, *amici* are very concerned that the military not be drawn into civilian policing functions in the United States for which it is not well trained, which will inevitably lead to problems and detract from, and undermine its support in performing, its primary function of fighting and winning the nation's wars.

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

Since the founding of our country, civilian and military leaders have supported limitations on the use of the United States military for domestic law enforcement.[2] These limitations are an essential component of the fundamental American tradition of resisting military intrusion in civilian affairs. The indefinite detention of Petitioner, a civilian lawfully

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[2] It is "one of the paramount principles for which the Revolutionary War was fought: soldiers, needed and honored in war for the valor and strength that turns back the nation's enemies, are never to be used against their civilian countrymen, no matter how expedient their utilization might seem." David E. Engdahl, *Soldiers, Riots and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 Iowa L. Rev. 1, 28 (1971).

resident in the United States, in the Consolidated Naval Brig in South Carolina, is contrary to the long-standing limitations on military involvement in domestic law enforcement and the fundamental traditions from which they arise.

Congress codified the prohibition on the use of the military to execute domestic laws in the Posse Comitatus Act of 1878 ("PCA"), explicitly making it unlawful to "use any part of the Army as a posse comitatus or otherwise to execute the laws." 18 U.S.C. § 1385. The military detention of a civilian lawfully residing in the United States is prohibited by the PCA. Exceptions to the PCA can be and have been made. Although Congress has legislated exceptions to the PCA from time to time, it has always done so expressly. When it enacted the Authorization for the Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224, upon which the government relies to justify the military detention of Petitioner, Congress created no such express exception and none can be implied. The general language of the AUMF neither overrules nor limits the specific limitations imposed by the PCA on military involvement in domestic law enforcement. There is no clear statement of congressional intent to set aside the PCA and permit the military detention of Petitioner.

This Court has repeatedly recognized this nation's fundamental tradition of resistance to military participation in civilian affairs.

> . . . The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds. . . .
>
> . . . .

> In light of this history, it seems clear that the Founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other constitutional protections, merely by giving Congress the power to make rules which were 'necessary and proper' for the regulation of the 'land and naval Forces.' Such a latitudinarian interpretation of these clauses would be at war with the well-established purpose of the Founders to keep the military strictly within its proper sphere, subordinate to civil authority.

Reid v. Covert, 354 U.S. 1, 23-24, 30 (1957) (plurality opinion). In *Ex parte Milligan*, this Court held that if it is possible in times of war to "substitute military force for and to the exclusion of the laws, and punish all persons, as [the executive] thinks right and proper, without fixed or certain rules . . . [then] republican government is a failure, and there is an end of liberty regulated by law." 71 U.S. 2, 125 (1866). Even when Congress authorized martial law in Hawaii during World War II, the Court held that it did not intend to "exceed the boundaries between military and civilian power" and, therefore, did not authorize the trial of civilians by the military. *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946). The Court has also held that Congress had no authority to pass a law authorizing the military trial of civilian ex-soldiers for crimes committed during service, noting that "[f]ree countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22-23 (1955).

The military itself has long held a strong preference in favor of maintaining the PCA's restrictions on its participation in domestic law enforcement. There are good reasons for this preference. First, the military's principal mission is to provide for the national defense. The character and capabilities necessary to succeed at this mission are different from those required for the domestic detention of civilians. Second, violations of the PCA could put individual military personnel at risk of criminal or civil liability. Finally, the military detention of civilians undermines the necessary combination of trust and distance between military personnel and civilians. A dramatic departure from the PCA, such as the military detention of civilians, has profound implications for the future role of the military and its relationship with civilians. History is replete with examples of the danger inherent in permitting the military to be routinely involved in domestic law enforcement.

The Fourth Circuit overlooked the PCA and did not consider the negative impact of its decision on the military. In light of the PCA's restrictions on the use of the military to execute domestic laws and the absence of an exception in the AUMF or elsewhere, *amici* respectfully suggest that the Court reject the Fourth Circuit's reading of the AUMF as giving the President authority to militarily detain Petitioner and return Petitioner to civilian custody.

ARGUMENT

I. THE POSSE COMITATUS ACT PROHIBITS THE MILITARY DETENTION OF PETITIONER, NONE OF THE EXCEPTIONS TO THE PCA ARE APPLICABLE, AND THE AUTHORIZATION FOR THE USE OF MILITARY FORCE DID NOT OVERTURN OR OTHERWISE LIMIT THE PCA

The PCA explicitly limits the use of the military for domestic law enforcement. It reflects a fundamental tradition of our country.[3] Although there are exceptions to the PCA, they do not permit the detention of Petitioner. The AUMF creates no new exception to the PCA for domestic military detention of civilians, and thus the PCA continues to apply and must be followed.

Petitioner's detention by the military is inconsistent with the PCA. Petitioner was lawfully resident in the United States when he was arrested by FBI agents at his home in Peoria, Illinois. Criminal charges were filed and Petitioner was in federal custody in New York, and then Illinois, while preparations for a criminal trial in the Central District of Illinois went forward. Eighteen months after Petitioner's arrest, the President ordered the Attorney General to surrender Petitioner to the Secretary of Defense. Petitioner was removed from civilian

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[3] An analysis of the PCA by the Departments of Defense and Justice said: "The Act expresses one of the clearest traditions in Anglo-American history: that using military power to enforce the civilian law is harmful to both civilian and military interests." Hearing on H.R. 3519 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 97th Cong. 16 (1981).

custody and transferred to military custody, despite the continued availability of civilian courts and detention. Petitioner remains in military custody without charge or trial. The PCA's limitations prohibit such use of the military to detain Petitioner, displacing civilian law enforcement authorities.

A. The PCA Limits the Use of the Military for Domestic Law Enforcement

Congress passed the PCA in 1878 to restore the traditional separation between the military and civilian authorities in domestic affairs that had come undone during Reconstruction.[4] After the Civil War, troops were stationed throughout the South and were used to enforce domestic laws, tamp down disturbances, and support the new governments in the ex-Confederate states.[5] Use of the troops, however, also "became a common method of aiding revenue officers in suppressing illegal production of whiskey [and] assisting local officials in quelling labor disturbances." Clarence I. Meeks III, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 Mil. L. Rev 83, 90 (1975). Troops were also stationed at voting polls, and allegations were made that they were used to frighten people to prevent them from voting. *See* 5 Cong. Rec. 2114 (1877); 7 Cong. Rec. 3852, 4185 (1878). There were allegations that the use of the military at polls in the South contributed to an unfair victory for Rutherford B. Hayes in the 1876 presidential elec-

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[4] *See United States v. Allred*, 867 F.2d 856, 870 (5th Cir. 1989); *see also* Stephen Young, *The Posse Comitatus Act of 1878: A Documentary History* xv (2003).

[5] James P. O'Shaughnessy, *The Posse Comitatus Act: Reconstruction Politics Reconsidered*, 13 Am. Crim. L. Rev. 703 (1976).

tion.[6] Representatives in Congress criticized the use of the military as "wholly unnecessary and actually hurtful" and "dangerous to the liberties of the country." 5 Cong. Rec. 2112, 2159 (1877). Senator Benjamin Hill characterized the proper role of the military as this: "The military never executes the law. The military puts down opposition to the execution of the law when that opposition is too great for the civil arm to suppress. . . . Therefore, I say it ought to be unlawful in all cases to talk about calling upon the Army to execute the law." 7 Cong. Rec. 4247 (1878). Military commanders joined members of Congress in objecting to the assignment of domestic law enforcement duties to the military. *See* 7 Cong. Rec. 3579-3582 (1878).

The PCA is a landmark statute. Upon its passage, it was said that Congress "had secured to the people of this country the same great protection against a standing army which cost a struggle of two hundred years for the Commons of England to secure for the British people." 7 Cong. Rec. 4686 (1878). Legislative history from the original and later related statutes makes clear that, with the PCA, Congress sought to isolate the military from engaging in domestic law enforcement activities. The PCA was a response to specific objections arising during the Reconstruction era, but it continues to "embod[y] the inveterate and traditional separation between the military's mission and civil law enforcement." S. Rep. No. 97-58, at 148 (1981); *see also* 127 Cong. Rec. 2005

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[6] *See* Meeks, at 90-91. The military was dispatched to guard the local boards of canvassers in South Carolina, Florida and Louisiana, and the results in each of these states were contested. The award of their electoral votes to Hayes resulted in his victory.

(1981) (PCA codifies the "important principle prohibiting military involvement in civil law enforcement.").

The PCA is a criminal statute that provides:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus[7] or otherwise to execute the laws[8] shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1385.[9]

The PCA has been supplemented by other statutes, most significantly 10 U.S.C. §§ 371-382, which authorize military assistance to civilian law enforcement under specific circumstances. Congress was explicit that this military assistance not include

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[7] The term "posse comitatus" means "power of the county," and at common law it refers to the population over the age of 15 that a sheriff could call upon to join his posse for the purposes of responding to violations of laws or civil disorders. *See United States v. Yunis*, 681 F. Supp. 891, 891 n.1 (D.D.C. 1988) (citations omitted), *aff'd*, 924 F.2d 1086 (D.C. Cir. 1991).

[8] The term "execute the laws" applies to tasks ordinarily assigned to civilian government or solely for the purpose of civilian government. Charles Doyle, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law* 37 (Congressional Research Service, 2000).

[9] DoD Directive 5525.5, *DoD Cooperation with Civilian Law Enforcement Officials* (Jan. 15, 1986), implements the PCA and applies its restrictions to the Navy and the Marine Corps in addition to the Army and the Air Force. As used in this brief, the "military" includes the Army, Air Force, Navy, Marines, their Reserve components, and the National Guard when in federalized status. It does not include the Coast Guard, or the National Guard when state-controlled.

"direct participation" by the military in civilian law enforcement such as "seizure, arrest, or other similar activity." 10 U.S.C. § 375. Unless otherwise authorized, arrests, apprehensions, and similar activities are "*per se* prohibited as posse comitatus violations." Dep't of the Air Force, General Counsel Guidance Document: Posse Comitatus, Off. Gen. Counsel (Sept. 2003). Military assistance is also prohibited if it will impair military preparedness. 10 U.S.C. § 376. Together, the original statute, the supplementing statutes, and the Department of Defense Directive form the core sources for PCA analysis and application.

This Court and others have recognized the PCA as a limitation on the use of military forces for civilian law enforcement. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644-45 (1952) ("Congress has forbidden [the President] to use the army for the purpose of executing general laws except when expressly authorized by the Constitution or by Act of Congress.") (citing to the PCA). Moreover, "traditional American insistence on exclusion of the military from civilian law enforcement" influences the interpretation of the PCA by the courts. *United States v. Walden*, 490 F.2d 372, 376 (4th Cir. 1974). In those instances when the courts have held that civilian-military interaction does not violate the PCA, one or more of the following three constraints were present. *See United States v. Yunis*, 924 F.2d 1086, 1094 (D.C. Cir. 1991); *see also* Effect of the Posse Comitatus Act on Proposed Detail of Civilian Employee to the National Infrastructure Protection Center, 22 Op. Off. Legal Counsel 103 (1998). First, there was no "direct active use" of troops to execute the laws, including making arrests, seizing evidence, searching persons or buildings, interviewing witnesses,

pursuing escaped civilian prisoners, and searching for suspects. *United States v. Red Feather*, 392 F. Supp. 916, 923-25 (D.S.D. 1975); *see United States v. Yunis*, 681 F. Supp. 891, 892 (D.D.C. 1998), *aff'd*, 924 F.2d 1086 (D.C. Cir. 1991). Second, civilians were not subject to the "exercise of military power which was regulatory, proscriptive, or compulsory in nature." *United States v. McArthur*, 419 F. Supp. 186, 194-95 (D.N.D. 1975), *aff'd sub nom.*, *United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976); *see also United States v. Bacon*, 851 F.2d 1312, 1313 (11th Cir. 1988). Third, the use of military personnel did not pervade the activities of civilian law enforcement. *See Hayes v. Hawes*, 921 F.2d 100, 102-03 (7th Cir. 1990); *Yunis*, 681 F. Supp. at 892.

None of those three constraints is present with respect to the military detention of Petitioner. First, military troops are directly and actively used to detain Petitioner in the U.S. Consolidated Naval Brig in South Carolina. Second, Petitioner is subject to compulsory military power as he remains in the brig indefinitely and without charge or trial. Third, military personnel have completely displaced and replaced civilian law enforcement in the detention of Petitioner, a lawful resident of the United States already in civilian custody for eighteen months and scheduled for trial in federal district court. The PCA clearly prohibits the use of the military to detain Petitioner.

B. None of the Exceptions to the PCA Permits the Military Detention of Petitioner

The PCA has been characterized as "absolute in its command and explicit in its exceptions." *Wrynn v. United States*, 200 F. Supp. 457, 465 (E.D.N.Y. 1961).

By the text of the PCA, express constitutional or statutory exceptions are the only permissible ways the military can participate in domestic law enforcement. None of the exceptions permits the military detention of a civilian, a lawful resident of the country, in the United States.

The most significant statutory exceptions to the PCA allow specific types of military assistance to civilian law enforcement, most notably in support of efforts to combat drug trafficking.[10] These exceptions permit the military to provide civilian law enforcement authorities with (i) information collected during the normal course of military operations, (ii) equipment and facilities, (iii) training and advice, (iv) under specific circumstances, operation and maintenance of the equipment and facilities made available, and (v) use of military equipment and facilities outside of the United States in certain emergency situations. 10 U.S.C. §§ 371-374.[11] None of these exceptions applies in this case.

The Department of Defense in its regulations asserts two significant constitutional exceptions to

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[10] *See* H.R. Rep. No. 97-71 (1981), *as reprinted in* 1981 U.S.C.C.A.N. 1785.

[11] Other statutory exceptions include the Insurrection Act, 10 U.S.C. §§ 331-335 (permits the military to assist civil authorities with civil disturbances under certain circumstances); 5 U.S.C. App. 3 § 8(g) (Inspector General not limited by PCA in carrying out audits and investigations); 16 U.S.C. § 23 (Secretary of the Army may detail troops to protect Yellowstone National Park at request of the Secretary of the Interior); 18 U.S.C. § 3056 (Director of the Secret Service may request assistance from the military to protect the President); and 22 U.S.C. § 461 (President may use military to stop ships that are in violation of the Neutrality Act).

the PCA. *See* DoD Directive 5525.5, *DoD Cooperation with Civilian Law Enforcement Officials*, Encl. 4 (Jan. 15, 1986). First, they assert that "emergency authority" exists to use military forces when local authorities are unable to provide protection for life or property and restore federal government function and public order, and the military may engage in "protection of Federal property and functions" when local authorities are unable to do so. *See* 32 C.F.R. § 215.4c(1); DoD Directive 3025.12, *Military Assistance for Civil Disturbances* (Feb. 4, 1994). Second, they assert that military forces may be used for the "primary purpose of furthering a military or foreign affairs function," such as investigations related to enforcement of the Uniform Code of Military Justice or protection of Department of Defense personnel. *See* DoD Directive 5525.5, Encl. 4. Neither exception applies to the seizure and detention of a lawful resident. In summary, the PCA governs, and none of its exceptions applies.

C. The AUMF Does Not Create a New Exception to the PCA

The Fourth Circuit majority held that Petitioner could be detained by the military because of the authority Congress gave to the President in the AUMF. However, the PCA and its prohibitions on the use of the military for domestic law enforcement were not taken into consideration by the Fourth Circuit.[12] The AUMF creates no new exceptions to

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[12] Only two of the separate *en banc* opinions of the Fourth Circuit make even passing reference to the PCA. Judge Motz notes the now-repealed 2007 amendments to the Insurrection Act providing the President with the authority to deploy armed forces at home to protect the country in the event of terrorist attacks or incidents were "notwithstanding the Posse Comitatus

the PCA. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). The AUMF neither explicitly creates an exception to nor implicitly repeals the PCA, and therefore the specific provisions of the PCA continue to govern the military's domestic behavior.

First, although the AUMF pertains to military action, nothing in its text refers to the PCA or makes the PCA inapplicable. Second, the Court has made clear that there is a strong presumption against implied repeals of prior federal laws. *See J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 137 (2001) ("overwhelming evidence is needed for repeal by implication"); *see also Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996). This rule is nearly absolute; Congress acts with knowledge of its prior enactments, and this Court has repeatedly made clear that, where Congress wants to repeal its prior actions, it must "expressly contradict" its earlier act or it must be "absolutely necessary" for the act to be interpreted as a repeal "to have any meaning at

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Act" but "military control cannot subsume the constitutional rights of civilians. Rather, the Supreme Court has repeatedly catalogued our country's "deeply rooted and ancient opposition . . . to the extension of military control over civilians." *Al-Marri v. Pucciarelli*, 534 F.3d 213, 251-52 (4th Cir. 2008) (citation omitted). Judge Wilkinson cites the PCA in support of the statement that "[t]he American constitutional tradition is not consonant with the prospect of martial law in other than necessitous circumstances." *Id.* at 312. However, he disregards the importance and effect of the PCA when he goes on to state that the judiciary should not interfere with democratic efforts to ward off the dangers of war.

all." *Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (2007); *see also Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 109 (1991) ("[L]egislative repeals by implication will not be recognized . . . 'absent a clearly expressed congressional intention to the contrary.'") (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)); *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936) ("[T]he intention of the legislature to repeal must be clear and manifest."). That rule should have special force when the prior law purportedly being repealed is so fundamental to our traditions. The AUMF is absolutely silent on the issue of military involvement in domestic law enforcement, as well as the issue of detention more broadly. It neither expressly contradicts nor is irreconcilable with the PCA. Moreover, there is simply nothing in the legislative history of the AUMF to indicate Congress had any intent to repeal any portion of the PCA.

This Court has repeatedly made clear that where a law applies to a specific issue – as the PCA does to military involvement in domestic law enforcement – others laws of a more general scope will not interfere with the operation of the specific law, *generalia specialibus non derogant*. *See Morales v. TWA, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general."); *see also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) ("[A] statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum."). Applying the general language of the AUMF authorizing the use of the military would "undermine limitations" created by the more specific provision, the PCA. *See Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996). Given the founding historical

tradition behind the PCA and the explicit nature of existing exceptions, the AUMF's broad language about "necessary and appropriate force," and its silence on domestic military action do not create an exception to the specific language of the PCA. To read it to do so would be contrary to established principles of statutory construction.

Even apart from the express statutory framework of the PCA, an exception to the fundamental principles it embodies would require a clear statement, which the AUMF does not provide. When a "weighty and constant value" such as the divisions between the military and civilian spheres is at issue, "'the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" *See Astoria Fed. Sav. & Loan*, 501 U.S. at 109 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)). The need for a clear statement is particularly pressing when the liberties of the individual are at stake. *See Gutknecht v. United States*, 396 U.S. 295, 306-07 (1970) ("Where the liberties of the citizen are involved . . . we will construe narrowly all delegated powers that curtail or dilute them."); *Ex parte Endo*, 323 U.S. 283, 300 (1944) ("[W]e must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used"). This Court has consistently required, at a minimum, a clear statement of congressional intent when the Executive wants to expand military authority such that it might depart from the fundamental division between military and civilian authorities. *See Endo*, 323 U.S. at 300 (applying clear statement requirement to prohibit domestic

military detention of Japanese-American citizen); *Duncan*, 327 U.S. at 304, 315 (applying clear statement requirement to reject claim of statutory authorization for military trials of civilians); *Youngstown Sheet & Tube Co.*, 343 U.S. at 588-89 (requiring explicit congressional authorization for military seizure of steel mills); *see also Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814) (finding the declaration of war against Great Britain and authorization of military force did not imply authority to seize property of enemy aliens in the United States and Congress would have to explicitly authorize this kind of departure from the "modern law of nations"). There is no clear statement by Congress that the Court can look to as authorizing the military detention of Petitioner.

The presumption against implied repeals, the rule that specific statutes govern more general ones, and this Court's expectation of a clear statement by Congress in cases of this type set the bar extremely high for finding that the AUMF created an exception to the PCA that would permit the military detention of Petitioner. There is nothing in the AUMF that can overcome this bar. Absent an express exception to the PCA, Petitioner should not be detained by the military.

II. DETENTION OF A LAWFUL RESIDENT IN THE UNITED STATES IS AN UNWELCOME DEPARTURE FOR THE MILITARY AND DETRIMENTAL TO THE RELATIONSHIP BETWEEN MILITARY PERSONNEL AND CIVILIANS

Amici have had responsibility for the legal affairs of the military, and based on their experience, believe it is important to prevent the military from being

drawn into civilian policing and justice functions. The quality and character of the United States military would be undermined by a more extensive involvement in domestic law enforcement. The PCA serves to permit certain types of military assistance while avoiding the risks of military involvement in domestic law enforcement, and its limitations should be observed for the good of the military and the country.

Military officials have historically expressed concerns about any involvement in domestic law enforcement. *See* 7 Cong. Rec. 3579-3582 (1878). During hearings in 1981 on proposed supplements to the PCA allowing specific types of military assistance to civilian law enforcement in support of efforts to combat drug trafficking, the General Counsel of the Department of Defense strongly resisted the diversion of military personnel to nonmilitary functions and expressed a firm opposition to the use of troops in arrests and seizures. *See* Hearing on H.R. 3519 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 97th Cong. 6, 19-20 (1981). The military became more comfortable with the supplements only after Congress made it explicit there would be no direct military involvement in domestic law enforcement. *See* William H. Taft IV, *The Role of the DoD in Civilian Law Enforcement*, Def. 83, Mar. 1983, at 6. In response to a question about the applicability of the PCA to United States Northern Command, the training of an active Army unit in the United States for on-call response to domestic emergencies and disasters, Colonel Michael Boatner said, "It absolutely governs in every instance. We are not allowed to help enforce the law. We don't do that. . . . [I]f we review the requirement that comes to us from civil authority and it has any complexion of law

enforcement whatsoever, it gets rejected and pushed back, because it's not lawful."[13] Congress has echoed the military's concerns.[14]

Congress and the public at large have expressed concerns about departures from the PCA. A recent potential departure arose in Section 1076 of the Defense Authorization Act for Fiscal Year 2007. Section 1076 modified the Insurrection Act[15] from a narrow authorization for the President to declare a form of martial law during violent insurrections, when state and local authorities resist lawful orders, to a broader grant allowing the President to use the military domestically to restore public order and enforce the laws of the United States when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition, the President determines that domestic violence has occurred to such an extent to

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[13] Democracy Now! The War and Peace Report: Is Posse Comitatus Dead? US Troops on US Streets, (radio broadcast Oct. 7, 2008) (*available at* http://www.democracynow.org/2008/10/7/us_army_denies_unit_will_be).

[14] *See, e.g.*, Senator Barry Goldwater's summary of the concerns about changes to the PCA during a debate over the use of the military to support anti-drug efforts: "Mr. President, for more than 100 years, during two World Wars and many other armed conflicts when the dominance of military power was essential for the survival of our way of life, there has been no need to amend that statute, because the concept embodied in that statute is the essential American ideal that the Armed Forces are maintained to prevent foreign aggressors from imposing their system of government upon us, and not to impose upon our own people the domestic laws of this Nation. We have civilian forces, known as police, to enforce our domestic laws." 132 Cong. Rec. 26448 (1986).

[15] 10 U.S.C. §§ 331-335.

prevent public order.[16] Although this represented a potentially dramatic expansion of the President's ability to use the military under the Insurrection Act for domestic law enforcement, Senator Patrick Leahy said the change "was just slipped in the defense bill as a rider with little study. Other congressional committees with jurisdiction over these matters had no chance to comment, let alone hold hearings on, these proposals."[17] Senator Leahy warned that "[u]sing the military for law enforcement goes against some of the central tenets of our democracy."[18] The National Sheriffs' Association said the change "undermines the American tradition manifested under the original Insurrection Act of 1807 and the Posse Comitatus Act of 1878 (18 U.S.C. § 1385) which helped to enforce strict prohibitions on military involvement in domestic law enforcement."[19] The National Governors Association said "[t]he changes made in Section 1076 . . . place the safety and welfare of citizens in jeopardy and should be repealed."[20] The Fraternal Order of Police said the Insurrection Act

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[16] National Defense Authorization Act, 2007, Pub. L. No. 109-364, § 1076, 120 Stat. 2083, 2095 (2007).

[17] Remarks of Sen. Patrick Leahy, National Defense Authorization Act for Fiscal Year 2007, Conference Report, Congressional Record (Sept. 29, 2006) (*available at* http://leahy.senate.gov/press/2006-9/-92906b.html).

[18] *Id.*

[19] Letter from Sheriff Ted Kamatchus, President of the National Sheriffs' Association, to Senators Patrick Leahy and Christopher Bond (Feb. 20, 2007) (*available at* http://leahy.senate.gov/press/200702/NationalSheriffsAssociation.pdf).

[20] Letter from Governors Michael Easley and Mark Sanford to Senators Patrick Leahy and Christopher Bond (Feb. 5, 2007) (*available at* http://leahy.senate.gov/issues/InsurrectionAct/GuardGovernorsAssociation.pdf).

was "a narrow and specific exception to the proud tradition of our nation to prohibit the use of the military to enforce domestic laws" and "[s]hort of an armed and active insurrection, our military personnel should not be used to displace State and local law enforcement."[21] When Congress took notice of the extent of the change and the potential for the use of the military in domestic law enforcement, it asserted its commitment to the PCA and repealed Section 1076 in its entirety, restoring the original Insurrection Act of 1807.[22]

Separation from domestic law enforcement activities is also important to preserve the apolitical nature of the military. In discussing the circumstances that would make it possible for the military to assist with the response to an event like Hurricane Katrina, Admiral Timothy Keating said pre-existing criteria such as severity and level of damage could help remove politics from the decision, and ensure "[t]he success or failure of our effort won't depend on the political dealings between the governors and the president. . . . We'll just get a mission and we'll execute it."[23] Admiral Keating expressed wariness about a role for the military in law enforcement and also concern for how doing so fit with the civilian view of the role of the military, saying "I don't think

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[21] Letter from Chuck Canterbury, National President of the Fraternal Order of Police, to Senator Patrick Leahy (Apr. 30, 2007) (*available at* http://leahy.senate.gov/issues/InsurrectionAct/FraternalOrderofPolice.pdf).

[22] National Defense Authorization Act, 2008, Pub. L. No. 110-181, § 1068, 122 Stat. 3, 14 (2008).

[23] Eric Schmitt & Thom Shanker, *Military May Propose an Active-Duty Force for Relief Efforts*, N.Y. Times, October 11, 2005.

the American people writ large are anxious to have active-duty forces in a law enforcement role."[24]

The military, of course, is not organized for the purposes of administering justice or engaging in domestic police work, but for the purpose of fighting and winning the country's wars. *See* Center for Law and Military Operations, *Domestic Operational Law Handbook for Judge Advocates* 428 (2006); *see also United States ex rel. Toth*, 350 U.S. at 17 ("Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. . . . To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served.") *See Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (describing military life as needing "unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel"). The military is not trained to balance society's interests in punishment against the need for fairness or an individual's right to due process. These are not its core functions; they are the functions of the civilian justice system, which has successfully handled cases involving suspected terrorists. *See, e.g.*, *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999); *United States v. Lindh*, 227 F. Supp. 2d 565 (E.D. Va. 2002).

The detention of lawful United States residents is not contemplated in the military's regulations or anticipated in the training of military personnel. The differences in skills and training were noted during a Senate debate about the use of the military in anti-drug domestic law enforcement. "The Armed Forces

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[24] *Id.*

have not, and should not be, trained and equipped to be customs agents. Ground troops have not studied how to pick out the drug smuggler coming across a border hidden among a group of law-abiding American citizens. Combat personnel have not been trained to conduct searches of people and belongings in accordance with constitutional safeguards because, in a war zone, those safeguards do not exist on foreign soil." 132 Cong. Rec. 26448 (1986). Instead, military manuals describe the importance of the constitutional and historical traditions of restricting the military role in civilian law enforcement. *See* Center for Law and Military Operations, at 430; *see also* DoD Directive 5525.5.

The military's role of providing for the national defense is not consistent with the domestic law enforcement task of detaining lawful residents in the United States, and the military is therefore not adequately prepared for such a task. This lack of preparation and training may also pose a problem for individual military personnel, who might be subject to tort liability. During the debates in Congress over the adoption of statutes supplementing the PCA in 1981, a proposal to allow military personnel to search and seize was criticized on a number of grounds including that it may subject soldiers to civil tort liability. *See* 127 Cong. Rec. 15671 (1981). Military personnel, even if acting under orders, might face criminal and civil liability if their actions were an unlawful violation of the PCA.

Military detention of civilians lawfully resident in the United States risks increased conflict between the military and civilians.[25] Avoidance of military-

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[25] In 1997, marines on an authorized drug-surveillance mission in Texas shot and killed a civilian teenager tending to his

civilian conflict is a longstanding national goal and an important consequence of the PCA. The "trust relationship between civilian society and the military" has been characterized as "a cornerstone of our system of government." John J. Pavlick, Jr., *The Constitutionality of the U.C.M.J. Death Penalty Provisions*, 97 Mil. L. Rev. 81, 119 (1982). An injury to the "relationship between the military and civilian communities" can make "it more difficult for service members to obtain needed local support." *United States v. Pirraglia*, 24 M.J. 671, 672 (A.C.M.R. 1987). This Court has recognized that in many ways, the military is "a specialized society separate from civilian society." *Parker v. Levy*, 417 U.S. 733, 743 (1974). And the differences "create 'particular tensions when the military and civilian realms conjoin.'" *Berry v. Bean*, 796 F.2d 713, 717 (4th Cir. 1986) (quoting *Serrano Medina v. United States*, 709 F.2d 104, 107 (1st Cir. 1983)). The effort to avoid confrontation between military personnel and civilians is illustrated by the fact the military does not have the required affirmative statutory grant from Congress to arrest civilians, although other federal bodies, such as the U.S. Forest Service, do. *See United States v. Moderacki*, 280 F. Supp. 633, 637 (D. Del. 1968). During congressional debates over proposed supplements to the PCA, there was concern that even though direct involvement was prohibited, a soldier might end up engaged in a "physical confrontation

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family's goat herd. There was considerable public outcry, prosecutors attempted to bring criminal charges against the marines involved, and the military's anti-drug operations along the Mexican border were suspended. The incident demonstrates the risks of military involvement in domestic law enforcement. *See* Sam Howe Verhovek, *Pentagon Halts Drug Patrols After a Killing at the Border*, N.Y. Times, July 31, 1997.

with civilians." *See* 127 Cong. Rec. 15669-15670 (1981). The then General Counsel of the Department of Defense said "it is the arrests and seizures . . . putting, really, into a confrontation, an immediate confrontation, the military and a violator of a civilian statute, that causes us the greatest concern." Hearing on H.R. 3519 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 97th Cong. 30 (1981). Detention of a civilian is inconsistent with the military's goal of limiting confrontation with civilians. Use of the military to enforce laws against civilians could have wide-ranging future implications, including undermining civilian support for the military.

The Fourth Circuit's affirmation of the military detention of Petitioner, lawfully resident in the United States and already in the civilian justice system and in the custody of domestic law enforcement at the time of his military detention, is contrary to the PCA's limitations on the use of the military for domestic law enforcement. It is inconsistent with the character and role of the military and creates undesirable tension between military personnel and civilians. The tradition enshrined in the PCA evolved out of a desire to stop government abuses of private individuals, and a failure to protect this tradition weakens the democratic system, the military, and the relationship between the two.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

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